(26,168)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 701.

THE CITY OF PAWHUSKA, PLAINTIFF IN ERROR,

vs.

PAWHUSKA OIL AND GAS COMPANY AND THE STATE OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1917.

1 Filed in Supreme Court of Oklahoma Aug. 28, 1917. William M. Franklin, clerk.

In the Supreme Court of the State of Oklahoma.

No. 9084.

CITY OF PAWHUSKA, Plaintiff,

vs.

PAWHUSKA OIL & GAS COMPANY and THE STATE OF OKLAHOMA, Defendants.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled cause, the City of Pawhuska hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of bond on appeal.

Assignment of errors herewith.

PRESTON A. SHINN,
Attorney for City of Pawhuska.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond for costs by the City of Pawhuska, in the sum of $500.00. Dated August 28, 1917.

J. F. SHARP,
Chief Justice of Supreme Court of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Filed in Supreme Court of Oklahoma Aug. 28, 1917. William M. Franklin, clerk.

[Endorsed:] No. 9084. Supreme Court of Oklahoma. City of Pawhuska, Plaintiff, v. Pawhuska Oil & Gas Co. et al., Defendants. Petition for Writ of Error.

2 Filed in Supreme Court of Oklahoma Aug. 28, 1917. William M. Franklin, clerk.

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No. 9084.

CITY OF PAWHUSKA, Plaintiff in Error,

vs.

PAWHUSKA OIL & GAS COMPANY and THE STATE OF OKLAHOMA, Defendants in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the Plaintiff in Error, City of Pawhuska, and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled action, and for the purpose of having the same reviewed and corrected in the United States Supreme Court makes the following assignment:

The Supreme Court of Oklahoma erred in holding and deciding that Chapter 93, pp. 150, 151, of the Session Laws of Oklahoma for 1913, were valid as against the City of Pawhuska. The validity of said chapter of said session laws was denied and drawn in question by the City of Pawhuska on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Oklahoma erred in holding and deciding,

First. That said Chapter 93 of the Session Laws of 1913, conferring jurisdiction on the Corporation Commission, did not impair the obligation of the contract between the City of Pawhuska and the Pawhuska Oil & Gas Company, contrary to the provisions of the Federal Constitution, Article 1, Section 10.

Second. That the decision and holding of the Corporation Commission raising and changing the rates and the terms provided for in the contract of the Pawhuska Oil & Gas Company with the City of Pawhuska did not impair the obligation of said contract, contrary to the provisions of the Federal Constitution, Article 1, Section 10.

For which errors the City of Pawhuska, Plaintiff in Error, prays that the said judgment of the Supreme Court of the State of Oklahoma, dated July 31, 1917, be reversed and a judgment rendered in favor of the City of Pawhuska and for costs.

PRESTON A. SHINN,
Att'y for Cit yof Pawhuska, Okla.

[Endorsed:] No. 9084. In the Supreme Court of the State of Oklahoma. City of Pawhuska, Plaintiff, v. Pawhuska Oil & Gas Co. et al., Defendants. Assignment of Errors and Prayer for Reversal.

3 Filed in Supreme Court of Oklahoma Aug. 31, 1917. William M. Franklin, clerk.

#9084.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State of Oklahoma in which a decision could be had in the said suit between City of Pawhuska, Oklahoma, and the Pawhuska Oil and Gas Company, a corporation, and The State of Oklahoma, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said City of Pawkuska, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of August, in the year of our Lord one thousand nine hundred and seventeen.

[Seal of theUnited States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of United States District Court,
for the Western District of Oklahoma.

Allowed, August 28, 1917.

J. F. SHARP,
Chief Justice of the Supreme Court of Oklahoma.

4 UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, this 18 day of September, 1917, in the City of Oklahoma City.

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By N. C. ORR, *Ass't.*

[Seal Supreme Court, State of Oklahoma.]

Costs paid by City of Pawhuska, $40.25.
Costs of transcript, $—, paid by City of Pawhuska.

5 Filed in Supreme Court of Oklahoma Sep. 18, 1917. William M. Franklin, clerk.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Pawhuska Oil and Gas Company, and The State of Oklahoma, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein the City of Pawhuska is plaintiff in error and you are each a defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this 28 day of August, 1917.

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Attest:

WM. M. FRANKLIN,
Clerk of Supreme Court of the State of Oklahoma.

We, attorneys of record for the Pawhuska Oil & Gas Company in the above entitled case, hereby acknowledge service of the above citation, and enter an appearance in the Supreme Court of the United States, this 30th day of August, 1917.

LEAHY & MACDONALD,
Attorneys of Record for the Pawhuska Oil & Gas Company.

I, attorney of record in the above entitled case for the State of Oklahoma, and Attorney General of said State, hereby acknowledge service of the above citation, and enter an appearance in the Supreme Court of the United States, this 28 day of August, 1917.

S. P. FREELING,
Attorney of Record and Attorney General for the State of Oklahoma.

6 Filed in Supreme Court of Oklahoma Sep. 18, 1917. William M. Franklin, clerk.

In the Supreme Court of the State of Oklahoma.

No. 9084.

CITY OF PAWHUSKA, Plaintiff in Error,

vs.

PAWHUSKA OIL & GAS COMPANY and THE STATE OF OKLAHOMA, Defendants in Error.

Stipulation for the Preparation of Transcript.

It is hereby stipulated and agreed by and between the City of Pawhuska, the Pawhuska Oil & Gas Company, and The State of Oklahoma, parties to the above entitled cause, that the following papers and instruments, as designated below, shall constitute the transcript, and be certified with the return to the Writ of Error to the Supreme Court of the United States, and the Clerk of the above entitled Court will act accordingly in the preparation of said transcript. That the following papers shall be all of record in the Supreme Court of Oklahoma that it shall be necessary to certify as constituting the transcript for the appeal:

1. Petition of Pawhuska Oil & Gas Co. to the Corporation Commission, with franchise exhibit.

2. Answer of City of Pawhuska, without exhibits.

3. Reply of Pawhuska Oil & Gas Co.

4. The findings and order of the Corporation Commission.

5. The first and second paragraphs of the Petition in Error, and error numbered "4" thereof.

6. The entry, if any, made by the Clerk of the Supreme Court at the time the Supreme Court rendered its opinion.

7. The complete opinion of the Supreme Court.

PRESTON A. SHINN,
Counsel for City of Pawhuska.
LEAHY MACDONALD,
Counsel for Pawhuska Oil & Gas Co.
S. P. FREELING,
Attorney General of Oklahoma, and Attorney of Record in this Cause for said State.

[Endorsed:] No. 9084. In the Supreme Court of the State of Oklahoma. City of Pawhuska, Plaintiff, vs. Pawhuska Oil & Gas Co., and The State of Oklahoma, Defendants. Stipulation.

7 Before the Corporation Commission of the State of Oklahoma.

No. —.

In the Matter of the Application of the Pawhuska Oil & Gas Company to have the Corporation Commission of the State of Oklahoma Fix Rates at which Gas is to be Sold to its Consumers in the City of Pawhuska, Oklahoma.

Comes now the Pawhuska Oil & Gas Company and respectfully shows to the Hon. Corporation Commission of the State of Oklahoma that it is a corporation, duly organized and existing under and by virtue of the laws of the State of Oklahoma; that it was in 1904, and at all times subsequent thereto, it has been the owner of a gas mining lease, situated adjacent to the City of Pawhuska, Oklahoma, and that in the year 1904, it discovered gas near said City of Pawhuska and immediately thereafter laid gas pipe lines from its wells to the City of Pawhuska and also laid lines in the streets and alleys of said City for the purpose of supplying the inhabitants thereof with natural gas; that it has continued said services at all times from that date to this; that in 1906, the inhabitants of Pawhuska caused the incorporation of said City into a City of the first class; that thereafter, in 1909, by an initiative petition, the inhabitants of the City of Pawhuska granted to the said Pawhuska Oil and Gas Company, a charter granting it the right to sell gas to the inhabitants of Pawhuska, and defining other rights and duties, copy of which charter is hereto attached, marked "Exhibit A" and made a part hereof.

Your petitioner would further show that in March, 1916, its lease expired and that a new lease was granted to it from the Osage Tribe of Indians on Osage tribal mineral lands for gas mining purposes

for a period ending January 1, 1931, and as much longer as the mineral rights of said land so leased should be in the Osage Tribe of Indians; that under the terms and conditions of said lease, this petitioner is required to pay to the Osage Tribe of Indians,
8 a royalty of 3¢ per thousand cubic feet at the well. It is also provided in said lease that the same is subject to the rules and regulations of the Secretary of the Interior; that said rules and regulations of the Secretary of the Interior adopted August 26, 1915, and under which said gas mining lease was made, among other things provides:

"All gas furnished to industrial and domestic consumers shall be metered and sold at meter rates."

Your petitioner would further show that all of its consumers in and about the City of Pawhuska are domestic and industrial consumers. The attention of the commission is respectfully called to the charter, copy of which is hereto attached, marked "Exhibit A" and specifically to that provision in the charter which provides that consumers may have the option to purchase gas at either meter rates or flat rates and that such provision in the charter, if obeyed, by the Pawhuska Oil and Gas Company would subject its lease to cancelation by the Secretary of the Interior for the reason that it would be violating the rules and regulations of the Secretary of the Interior to sell gas to consumers at flat rates.

It is represented to the commission that a very large part of the consumers of the Pawhuska, Oil and Gas Company in Pawhuska have in the exercise of the option conferred upon them by the said Charter, elected to purchase gas at flat rates and that they now refuse to purchase gas at meter rates. The Pawhuska Oil and Gas Company has not, to this time, refused to deliver gas to its consumers who have refused to purchase gas at meter rates, but has done everything possible to induce said consumers to purchase gas through meters and to make an equitable adjustment of the rates so that the said company might continue its services to said consumers at a reasonable rate and without loss to itself.

The company would further show that it is required to pay to the Osage Tribe of Indians a royalty of 3¢ per thousand cubic feet on all gas that is consumed in the said City of Pawhuska, whether the same is delivered to the consumer through meters or not;
9 that it is now operating its plant at a loss of from $500.00 to $600.00 per month and that it must either have rates fixed on such basis as will enable it to supply its consumers in the City of Pawhuska with gas, without a loss or to abandon its service of gas to such consumers.

The company would further show and represent that the gas supply in its present gas field is fast becoming exhausted and that in order for it to continue the supplying of gas to consumers in the City of Pawhuska, it will have to search for and find another gas field within its lease at a great expense to itself; that unless it has rates established at such a basis as will warrant it in making this additional expenditure for the purpose of supplying the consumers in the City of Pawhuska, it cannot go to the expense of

searching for other gas and laying pipe lines from such other gas field or fields to the City of Pawhuska.

The company would further show that the cost of maintaining and keeping up a supply of gas in a field and the cost of piping the same to the City of Pawhuska and distributing the same among the inhabitants of said city is very great. In fact, it is so great that unless the company has proper rates fixed, it must discontinue said service.

The company asserts and believes that a rate of 25¢ per thousand cubic feet for supplying gas to the inhabitants of Pawhuska would be a reasonable and practical rate, one that would furnish the consumers cheap fuel, and at the same time, enable the company to continue its service.

Wherefore, the company prays that the Honorable Corporation Commission may fix a time at which this petition can be heard and provide for the proper notice to the officials of the City of Pawhuska and the inhabitants thereof of the time and place of said hearing, and at said hearing that a proper rate may be fixed, such as will enable the company to continue its service to the inhabitants of said city.

LEAHY & MACDONALD,
Attorneys for Petitioner.

Filed Nov. 16th, 1916.

10 To the Honorable J. W. Stroud, Mayor of the City of Pawhuska, State of Oklahoma.

We the undersigned citizens and legal voters of the State of Oklahoma, and city of Pawhuska, order that the following proposed ordinance shall be submitted to the legal voters of the State of Oklahoma, City of Pawhuska, for their approval or rejection, at a special election to be held on the 12th day of October, 1909, and each for himself says: I have personally signed this petition; I am a legal voter of the State of Oklahoma and the City of Pawhuska. My residence and post-office addresses are correctly written after my name. The time for filing this petition expires in three months from the 12th day of August, 1909.

The question we herewith submit to our voters is:— Shall the following ordinance be adopted?

An ordinance granting to the Pawhuska Oil and Gas Company of Pawhuska, Oklahoma, corporation organized under, and by virtue of the laws of the Territory of Oklahoma, its successors and assigns, the privilege of acquiring, constructing, operating and maintaining a gas plant, mains, pipes and appurtenances in the streets, alleys and public grounds of said city, for the purpose of supplying natural gas to the said city and the inhabitants and concerns thereof, and defining the rights and privileges thereunder.

Be it ordained by the people of the City of Pawhuska, Oklahoma:

Section 1. That the Pawhuska Oil and Gas Company, a corporation, hereinafter known and termed the grantee, its successors and assigns, and is hereby authorized to construct, acquire, operate and maintain a gas system and gas works, in the City of Pawhuska, Oklahoma, and to sell and supply said city and inhabitants and concerns thereof, and to lay, use and maintain pipes and mains, with all necessary and proper attachments, connections and appurtenances, below the surface of the streets, alleys, sidewalks, lanes and public grounds, and on the bridges of said city, as the boundaries now are, or may hereafter be extended by additions to the present limits or boundaries thereof, for the supply and distribution of natural gas for illuminating, heating, manufacturing and motive power purposes, and to excavate therefor, and for the same purposes to erect and maintain necessary posts for lamps, and for same purposes to make connections for consumers with such pipes and mains, for a term of twenty-five years from and after the passage, publication and ratification as required by law, of this ordinance;

Provided: That all pipes hereafter laid shall be laid not less than eighteen inches below the surface.

Provided, further: That all pavements, sidewalks, and excavations damaged by grantee shall be repaired and replaced with like material, and left in as a good condition as before; and, should said grantee fail or refuse to replace and restore said pavement, sidewalks, or excavations, within a reasonable length of time, then the same may be replaced by the said City, at the expense and cost of said grantee.

Section 2. That under the permission and authority hereby granted, said grantee shall furnish natural gas to said City and inhabitants thereof at a reasonable rate, which shall in no case exceed the following rates for the following purposes towit:

For street lamps per month each, from sundown to sunrise, free. In case of inability for any reason of the City to furnish gas for public utilities or city buildings the grantee will furnish gas free.

Section 3. Under the permission and authority hereby granted, the said grantee shall furnish natural gas to the citizens, at
11 a reasonable rate, which shall in no case exceed fifteen cents per one thousand cubic feet of gas, as registered by standard meters for the measurement of natural gas, said meters to be furnished by and be the property of grantee, or at a flat rate at the

option of consumer, which said flat rate shall in no case exceed the following prices to wit:

Residence and Office Rates.

Cook stove or range, per month, $1.00; Heating stove, per month, for first heating stove, $1.00. All additional heaters, per month, $1.00 except small bed room heaters, which shall be 50 cents each, per month. Open gas grates $1.00. Incandescent lights, for ordinary use, per month, 10 cents each light.

Public Buildings, Hotels, Stores, etc.

Hotel and Restaurant gas ranges $1.75 per month; small stoves $1.00 per month; Medium sized stoves $1.50 per month; Large sized stoves $2.00 per month; Incandescent lights for ordinary use, per month 10 cents, and for all night use, 15 cents per month; Churches, Public and denominational schools free.

Section 4. That for the purpose of supplying natural gas to the said City and to the inhabitants thereof and to companies and to corporations said grantee, its successors and assigns, shall at its own expense, furnish and lay all pipes necessary for furnishing, conveying and distributing such gas to the curb line of said property to be supplied, adjacent to any of its gas mains, and such gas mains shall be laid or extended consistent with the growth of the city, and shall put in a "cut off" or valve at the curb in each instance.

Section 5. No person, firm or corporation shall be permitted to tap or make any connection with any main or gas line of said grantee, unless duly authorized to do so by the grantee, provided, no charge shall be made for such authority.

Section 6. In constructing, repairing and operating said gas system or gas plant, said grantee shall put up proper warnings and lights to prevent accident from open ditches or obstruction, and use every reasonable precaution to avoid damage or injury to persons or property and shall hold safe and harmless the city from damage, injury, loss, or expense, caused by the negligence of said grantee in the construction, repairing or operating said gas system or plant, or in paving or repaving any street, alley, avenue or sidewalk.

Section 7. All prohibitions, forfeitures and other provisions of this ordinance and franchise shall be binding upon the said grantee, its successors and assigns, whether expressly so stated herein or not; and all grants and privileges secured by this ordinance and franchise shall be held to inure to the benefit of said grantee, its legal and bona fide successors and assigns.

Section 8. That said grantee, its agents and employees, shall have the right at any time to enter upon the premises of any consumer for the purpose of inspecting the gas pipe, meter appliance and service; and no consumer shall tamper with any of said pipe, meter or appliance or permit the same to be done, or to make any fraudulent representations in regard to the consumption of gas by such

consumer; nor shall any consumer waste said gas or permit same to be wasted on his premises.

Section 9. Nothing herein shall be construed to require said grantee, its successors or assigns to furnish gas as above if the supply of natural gas shall become exhausted or insufficient to supply the demand or if the expense of obtaining and furnishing the same should become so great that the grantee cannot furnish gas at the above prices without loss. In the event the grantee does not furnish gas at not to exceed the above prices then all their rights under this franchise shall cease.

12 Section 10. Before or at the time of the acceptance of this ordinance said grantee shall execute and file with the City Clerk, of said City a bond in the sum of $5,000.00 with good and sufficient securities to be approved by the mayor and council of said City, conditioned and guaranteeing to hold said City harmless from any damage, injury, loss, expense to person or property caused by the negligence of said grantee in constructing, repairing, or operating said gas system or plant, or paving, repaving any street, alley avenue or sidewalk.

Section 11. Within thirty days after the passage, publication and ratification of this ordinance by a majority of the qualified electors voting thereon as required by law the said grantee, shall file with the City Clerk of said City its written acceptance of the provisions hereof, and in case of failure to file said acceptance within the time specified then this ordinance shall ipso facto cease and become null and void.

Section 12. This ordinance shall be in full force and effect from and after its passage publication and approval as provided by law, and filing of said written acceptance in the office of the City Clerk of said City by said grantee, and shall remain in full force and effect for a term of twenty-five years.

13 Before the Corporation Commission of the State of Oklahoma.

No. —.

In the Matter of the Application of the PAWHUSKA OIL & GAS COMPANY to Have the Corporation Commission of the State of Oklahome fix rates at which Gas is to be Sold to its Consumers in the City of Pawhuska, Oklahoma.

Answer.

Comes now the City of Pawhuska, Oklahoma, a Municipal Corporation, organized under the laws of the Territory of Oklahoma, in 1906, as a City of the First Class, and for its answer to the petition of the Pawhuska Oil & Gas Company filed herein, says:

That the City of Pawhuska, Oklahoma, was organized under the laws of the Territory of Oklahoma, as a City of the First Class, and

that as such City of the First Class, it entered into a contract with the Pawhuska Oil & Gas Company, the Plaintiff herein, to furnish and supply the City of Pawhuska, and the inhabitants thereof, with gas for lighting the streets, alleys and public buildings of said City, and to supply and furnish gas for the use of the inhabitants of said City, for a term of twenty-five years, and at rates stipulated in said contract, said stipulation being for maximum rates to be charged by said Pawhuska Oil & Gas Company to the said City of Pawhuska and the inhabitants thereof; that said contract was entered into through and by means of an initiative petition circulated by the Pawhuska Oil & Gas Company and its agents; that said petition was circulated and signed by the citizens of Pawhuska, defendant herein, and an election held submitting said contract to a vote of the citizens of the City of Pawhuska during the year of 1909; that at said election the said citizens of Pawhuska voted to accept of the terms of said contract as offered by the said Pawhuska Oil & Gas Company, and to grant to the said Pawhuska Oil & Gas Company a
14 franchise for the use of the streets, alleys and public grounds within the said City of Pawhuska, upon the several stipulations and conditions contained in said contract and franchise, voted upon by said inhabitants, at said election, being complied with by the said Pawhuska Oil & Gas Company, same being set forth in a copy of the contract hereto attached and made a part of this answer; that the Mayor and City Council of the said City of Pawhuska refused to comply with the request of the Pawhuska Oil & Gas Company, after the voters had expressed their will in favor of the granting of a franchise to the Pawhuska Oil & Gas Company, and said Mayor and City Council refused to grant said franchise and contract to the Pawhuska Oil & Gas Company, whereupon the said Pawhuska Oil & Gas Company brought their action against the said Mayor and City Council of the said City of Pawhuska, and asked the court to mandamus and compel the said Mayor and City Council of the said City of Pawhuska to execute and deliver said franchise and contract to the said Pawhuska Oil & Gas Company; that the District Court within and for the County of Osage, State of Oklahoma, in which said action of the Pawhuska Oil & Gas Company against the said Mayor and City Council of the said City of Pawhuska, was pending, granted the petition and prayer of the said Pawhuska Oil & Gas Company, and entered judgment against the said Mayor and City Council of the said City of Pawhuska, compelling them to grant to the said Pawhuska Oil & Gas Company their said franchise, and allow said company to use the streets, alleys and public grounds within the said City of Pawhuska, for the placing of mains, pipes, etc., to the end that said Pawhuska Oil & Gas Company might supply the said City of Pawhuska and the inhabitants thereof with gas for light and heat, and in accordance with the terms of the ordinance voted on by the said — at the said election, above mentioned; that the said Mayor and City Council of the said City of Pawhuska appealed from the judgment of the District Court of Osage County, Oklahoma, to the Supreme

Court of the State of Oklahoma; that in said hearing before
15 the Supreme Court of the State of Oklahoma, in said appeal, supra., the Mayor and City Council of the said City of Pawhuska contended that the said Pawhuska Oil & Gas Company had a right and franchise to use the said streets, alleys and public grounds of the said City of Pawhuska because of sec. 12, art. 2, chap. 26, pp. 435, 436 of Session Laws of 1909, and for that reason the said Mayor and City Council of the said City of Pawhuska were without right and authority to enter into a contract and franchise with the Pawhuska Oil & Gas Company, giving said Company the rights to use the streets, alleys and public grounds within said City of Pawhuska, because said Company had such rights conferred by said laws of 1909, supra; that on the 14th day of April, 1911, the said Supreme Court of the State of Oklahoma, rendered judgment in said action and appeal, and affirmed the judgment of the District Court of Osage County, Oklahoma, and shortly thereafter sent its mandate to the Clerk of said District Court, such mandate being accompanied, as required by law, with the points of law decided by said Supreme Court; that in rendering judgment in said action and appeal, the said Supreme Court of the State of Oklahoma rendered and filed an opinion setting forth the law of the case as found by said court; that in said opinion the said court held that sec. 12, art. 2, chap. 26, pp. 435, 436, of the Session Laws of 1909, did not give the said Pawhuska Oil & Gas Company a right and franchise to use the said streets, alleys, and public grounds within the said City of Pawhuska, and that before said Pawhuska Oil & Gas Company could lay its gas pipes, mains, and necessary connections and appurtenances in said streets, alleys and public grounds of the said City of Pawhuska and supply said city with gas, the said Company would have to have a franchise from the said City of Pawhuska; the said City of Pawhuska hereby pleads the said judgment of the Supreme Court of Oklahoma, and the judgment of the District Court of Osage County, Oklahoma, as ordered by the
16 said Supreme Court, the same as if said judgment and opinion of the said Supreme Court of Oklahoma were set forth herein verbatim, and the said City of Pawhuska alleges that said judgment became a right of property, or property right, and fixed the rights of the Pawhuska Oil & Gas Company and the City of Pawhuska, and finally determined that neither of said parties obtained any rights whatever under the law as set forth in sec. 12, art. 2, chap. 26, pp. 435, 436, of the Session Laws of 1909, and that the rights of said Pawhuska Oil & Gas Company to use the streets, alleys and public grounds within the said City of Pawhuska became vested in said Gas Company because of the referendum vote of the inhabitants and legal voters of the said City of Pawhuska; that said Pawhuska Oil & Gas Company accepted in writing of the said ordinance adopted by the inhabitants of the City of Pawhuska, wherein the inhabitants of said City accepted of the terms of the contract offered by the said Gas Company; that as a consideration for the right to use the streets, alleys and public grounds within the said City of Pawhuska, for the purposes aforesaid, to the end that said

Company might be permited to furnish and supply gas to the City of Pawhuska and its inhabitants, the said Pawhuska Oil & Gas Company agreed to furnish and supply free gas to the several schools and churches within the City of Pawhuska, and furnish and supply gas to the inhabitants of said City of Pawhuska at reasonable rates, which should in no instance exceed fifteen cents per one thousand cubic feet measured by standard meters, or at maximum flat rates, set forth in the said contract, hereto attached, at the option of the consumers; that the said Pawhuska Oil & Gas Company has at all times since the execution and acceptance of said contract been charging the maximum rate permitted under the terms of said contract;

that the said Pawhuska Oil & Gas Company also agreed to
17 furnish free gas to the said City of Pawhuska for its public utilities and City buildings in case for any reason the City was unable to furnish same.

That under the law in force in the State of Oklahoma at the time said Pawhuska Oil & Gas Company entered into its contract and franchise with the City of Pawhuska, the said City was granted authority to fix the rates that could be charged for gas, by the said Pawhuska Oil & Gas Company under its franchise for the use of streets, alleys and public grounds within said City, and that the said right lodged in the City of Pawhuska to fix rates to be paid for gas by the said City of Pawhuska and its inhabitants, and to fix the rates that the said Pawhuska Oil & Gas Company should be permitted to charge the said City of Pawhuska, and the inhabitants thereof, under said contract and franchise, is a valuable property right to the said City of Pawhuska, and to the inhabitants thereof.

That City of Pawhuska denies that the said Pawhuska Oil & Gas Company is loosing money in carrying out and performing the terms of its contract and agreement with the City of Pawhuska, and denies that the supply of gas is greatly diminishing and decreasing because of the efforts of the said Pawhuska Oil & Gas Company to comply with its contract with the City of Pawhuska. The City of Pawhuska says that after the said Pawhuska Oil & Gas Company obtain its right to use the streets, alleys and public grounds within the City of Pawhuska, by and through its said contract with the City of Pawhuska, the said Gas Company drilled a large excess of wells for the purpose of obtaining a large volume of gas, to the end that the said Pawhuska Oil & Gas Company might sell said gas to interstate pipe-line companies, at two cents, and less per thousand cubic feet; that the great expense created by the Pawhuska Oil & Gas Company was for the purpose of supplying a foreign demand,

and not the demand created under the terms of its contract
18 with the said City of Pawhuska.

The said City of Pawhuska alleges that the rights it obtained under the contract with the said Pawhuska Oil & Gas Company, for said City and the inhabitants thereof, and the obligations undertaken and promised by the said Pawhuska Oil & Gas Company to the City of Pawhuska and the inhabitants thereof, in said contract,

is a valuable property right to the said City of Pawhuska, and should not be impaired by the State of Oklahoma, by and through its laws, and its Corporation Commission; that in so far as the Utilities Act of 1913, being Chapter 93 of the Session Laws of 1913, by its terms, was, and is, intended to confer jurisdiction on the Honorable Corporation Commission to fix rates that the said Pawhuska Oil & Gas Company shall be permitted to charge for its gas under its contract with the City of Pawhuska, is void and unconstitutional as impairing the obligations of the contract between the said City of Pawhuska and the Pawhuska Oil & Gas Company, same being protected by section 10 of Article 1, of the Constitution of the United States, as well as Sec. 15, of Art. 11, of the Oklahoma Constitution.

The City of Pawhuska respectfully insists that it, the said City has the right to fix, by ordinance, the rates which shall be charged by the said Pawhuska Oil & Gas Company under the terms of its contract with said City, and that the said, The Honorable Corporation Commission, of the State of Oklahoma is without jurisdiction of this proceeding.

The said City of Pawhuska alleges that in the year of 1912 the citizens of Pawhuska adopted the Charter form of government, and that the City of Pawhuska, under the Charter, became the successor of the old and former City government; that by the terms
19 of said charter the said City of Pawhuska became the successor of and entitled to all the rights, contracts, privileges, choses and property, including all ordinances, of the City of Pawhuska, as the same existed when said charter was adopted and became effective, a copy of which "charter" is made a part of this answer.

CITY OF PAWHUSKA,
By E. L. McCAIN,
Its City Attorney.

PRESTON A. SHINN,
Of Counsel for Said City.

Filed January 19, 1917. A. L. Funk, reporter.

20 Before the Corporation Commission of the State of Oklahoma.

No. 636.

In the Matter of the Application of the PAWHUSKA OIL & GAS COMPANY to Have the Corporation Commission of the State of Oklahoma Fix Rates at which the City of Pawhuska and its Inhabitants shall pay for Gas to said Company.

Reply.

Comes now the Pawhuska Oil & Gas Company and for reply to the answer of the City of Pawhuska, denies generally and specifically

each and every allegation, except such allegations as admit the allegations of the Petition.

LEAHY & McDONALD,
Attorneys for Pawhuska Oil & Gas Company.

Filed January 19, 1917. A. L. Funk, rep't'r.

21 Corporation Commission of Oklahoma.

Order No. 1259.

Cause No. 2729.

In the Matter of the Application of the PAWHUSKA OIL & GAS COMPANY to have the Corporation Commission Fix Rates at which Gas is to be sold to its Consumers in the City of Pawhuska, Oklahoma.

Appearances:

For the Pawhuska Oil & Gas Co., Leahy & Macdonald, by Mr. Leahy.

For the City of Pawhuska, E. L. McCain, City Attorney, and Preston A. Shinn of Counsel.

Findings of Fact, Opinion and Order.

By the COMMISSION:

Application was filed by the Pawhuska Oil & Gas Company, referred to hereafter as the Gas Company, asking the Commission to fix rates at which gas shall be sold to the City of Pawhuska and the inhabitants thereof, and alleging that present rates are inadequate and insufficient to allow a return on the investment.

The evidence shows that the Pawhuska Oil & Gas Company is the owner of the gas mining lease adjacent to the City of Pawhuska; that since the year 1904, it has been supplying natural gas to the City of Pawhuska and the inhabitants thereof; that since the year 1909 it has been furnishing gas under a franchise voted by the City of Pawhuska; that prior to March, 1916, the company paid to the Osage Tribe of Indians only a nominal sum for the gas produced on its lease; that on said date its lease having expired, it made a new lease and was compelled to pay thereafter at the well three cents per thousand cubic feet for all gas sold for domestic consumption and two cents per thousand cubic feet for all gas sold for industrial consumption; that the regulations of the Secretary of the Interior, under which the company's lease is made, provide, among other things, that all gas furnished to industrial and domestic consumers shall be metered and sold at meter rates.

The evidence further shows that the franchise or charter which the company has with the City of Pawhuska provides that the con-

sumer may have the option of purchasing gas at either meter or flat rates; that at the time of the hearing there were 807 domestic consumers, 5 industrial consumers and 3 commercial consumers, and that only 90 of all the consumers had meters installed or were receiving gas through meters or paying for the same at meter rates.

Present and Proposed Rates.

The rates charged for gas at the present time are as follows:

Domestic consumers, per month, $1.00 per stove and 10 cents per light; for gas sold through meters not to exceed 15 cents per thousand cubic feet.

Industrial consumers: Brick company, 5 cents; ice company 5 cents; laundry 8 cents; bottling works 10 cents and mill and
22 elevator 10 cents per thousand cubic feet.

Hotels, restaurants and public buildings, flat rate, stoves and ranges $1.00 to $2.00 per month; lights 10 cents to 15 cents per month.

Public schools, churches, street lights, city power plant, free.

The Company ask the Commission to fix a rate of 25 cents per thousand cubic feet with a discount of 10 per cent, for prompt payment and a minimum rate of 50 cents per month for domestic consumers, and a maximum rate of 10 cents per thousand cubic feet with a minimum of $10.00 per month for industrial consumption and a maximum rate of 10 cents per thousand cubic feet for public schools and public utilities owned by the City of Pawhuska. House Bill No. 94 enacted by the recent legislature prohibits gas companies from making a minimum charge or collecting meter rents.

Right to Change Rates Fixed by Franchise.

The City through its attorneys filed a motion to dismiss, and later filed an answer to the Gas Company's pleadings, alleging that the Commission is without jurisdiction to fix rates in the City of Pawhuska by reason of a franchise voted by the people of Pawhuska to the gas company and the contract entered into between the gas company and the city of Pawhuska.

In the brief filed on behalf of the City, counsel make the contention that the Commission is without authority to fix meter rates or to prescribe the use of meters in the City of Pawhuska.

The Commission has heretofore considered the question of its authority to change rates fixed by franchise and has not hesitated to prescribe a different schedule of rates than that provided by franchise where the facts justified. This was the position taken in the case of J. I. Case Plow Works et al. vs. Okla. Gas & Elec. Co., Cause 1987, Order No. 911, P. U. R. 1915 B. 183, wherein the Commission in ordering a reduction of electric power rates, said:

"It is contended by the defendant that it is only complying with the ordinance which was adopted by the voters of Oklahoma City. The Corporation Commission, however, may alter rates established by the franchise * * * Chapter 93, Session Laws 1913, page

150, confers jurisdiction upon the Commission to fix rates, prescribe regulations, service and practices of water, heat, light and power companies and gives the Commission general supervision over such utilities.

"Whether the minimum rate provided in the franchise was reasonable depended upon the conditions that existed at the time the franchise was adopted by the people. The Commission must now determine the reasonableness of this minimum rate under the conditions and facts disclosed by the evidence in this case."

In cause No. 2584, Order 1314, City of Henryetta vs. Smith & Swan Gas Company, the Commission said:

"The Commission is of the opinion that when the franchise under consideration was granted, the municipality of Henryetta was without authority to exercise the legislative function of rate making to the extent of suspending the right of the sovereign authority to exercise same upon proper occasion."

The Commission herein cited a number of cases upholding this position of the Commission, among them the case of Ben-
23 wood vs. Public Service Commission, 83 S. E. 295, 55 L. R. A. (N. S.) 261, wherein the Supreme Court of West Virginia sustained an order of the Public Service Commission of that state changing water rates fixed by franchise and the case of Milwaukee Electric Railway & Light Company vs. Railroad Commission of Wisconsin, 238 U. S. 174, wherein the Supreme Court of the United States affirmed a decision of the Supreme Court of the State of Wisconsin sustaining a decision of the Wisconsin Railroad Commission changing rates fixed by franchise.

The case of the Pioneer Telephone & Telegraph Co. vs. State et al., 33 Okla., 724; 127 Pac., 1073, should be controlling as to the right of the Corporation Commission to change rates fixed by franchise. Therein the court held that the order of the Commission and not the franchise provision governed telephone rates. The position for the city that there is a material distinction between the issue involved in that case and the present case is, we think, not well taken. Therefore, the Commission holds that it has authority to prescribe a schedule of rates for the City of Pawhuska regardless of any franchise or contract existing between the City of Pawhuska and the Gas Company.

Installation of Meters.

The Commission can also order the installation of meters if the facts justify. Chapter 93, Session Laws 1913, provides in part as follows:

"Sec. 2. The Commission shall have general supervision over all public utilities with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operations and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted.

"Sec. 3. In addition to the powers enumerated, specified, men-

tioned or indicated in this act, the Commission shall have all additional, implied and incidental powers which may be proper and necessary to carry out, perform and execute all powers herein enumerated, specified, mentioned or indicated." * * *

Counsel for the City in their brief cite Chapter 200, Session Laws 1915, to uphold their contention that this Commission has no authority to require the installation of meters or to prescribe meter rates. This law, we think, was in no way intended to limit the Commission in the exercise of its authority to regulate gas companies.

In the case of the Pawhuska Oil & Gas Co. vs. City of Pawhuska, 148 Pac. 118, the Supreme Court upheld the right of the gas company to install meters under Chapter 152, Session Laws, 1913. Chapter 200, Session Laws 1915, in no wise prevents the Commission from requiring the installation of meters when the facts show that such a requirement would be justified. As heretofore pointed out, the regulations of the Secretary of the Interior, to which the Gas Company's lease is subject, provide that gas shall be sold through meters. Failure to comply with this requirement may mean cancellation of the lease and that the gas company would be deprived of the source of its supply.

It is a matter of common observation that the consumption of gas, water, or electricity on a flat rate, not subject to a meter measurement or affected by the quantity consumed, is productive of waste. A consumer of natural gas who is paying for the amount he uses on the flat rate instead of a meter basis, will ordinarily consume much more than he would if he were paying for it on a
24 meter basis. Stoves and lights will be allowed to burn when there is no necessity for burning them, and will consume greater quantities than there is any necessity of consuming. The history of natural gas consumption shows that where consumers have been allowed to pay for the amount they used on a flat rate, that it has been no uncommon thing to allow lights to burn day and night, whether needed or not. Investigations by the Commission show that more than one gas company in this State has been compelled to do business at a loss due solely to the fact that consumers were allowed to pay for gas on a flat rate and thereby use more than was necessary and more than was paid for at reasonable meter rates.

Exhibits filed in this case, and not excepted to by counsel for the City, show that certain consumers used one-third more gas on the flat rate than they do on the meter basis. (Gas Company exhibits I, J, K, and L.) The unnecessary use of gas, i. e., the consumption of amounts in excess of that required for the comfort of the necessity of the consumer is waste. Furthermore flat rates are discriminatory. Exhibits in this case show that the consumers purchasing gas on a flat rate are paying at least 25 per cent less than those who purchased gas through meters. This is an unlawful discrimination. All consumers of each class should be treated alike and no difference should be made in rates because a part of the consumers are allowed to buy gas on a flat rate whereas others are on

a meter basis. A portion of the consumers who pay for gas on flat rates will be provident in the use of gas. Some will use an unnecessary amount and will therefore throw the burden of their extravagance on the other consumers.

The Commissions of the various States have generally held that metered service should be required in order to prevent waste and to provide against discrimination.

The Wisconsin Railroad Commission in the case of Charlesworth vs. Omro Electric Light Company, P. U. R., 1951 B, 13, said:

"The Commission has found repeatedly that flat rates lead to waste of service and inequality of charges."

In the case of Wood vs. LaFarge, P. U. R. 1917A, 763, the same Commission said:

"The present flat rate schedule, in addition to being inequitable as between consumers, is doubtless responsible for a considerable amount of waste in that flat rate users invariably grow careless and allow faucets to remain open when water is not actually required or fail to have leaky fixtures repaired."

In the case of Redding vs. Northern California P. Ro. P. U. R. 1916F, 839, the California Railroad Commission said:

"It is believed that if meters are installed, and, in consequence, water waste is reduced, better pressure will result."

"An additional argument for installation of meters is the probable reduction in operating expenses. * * * The power bill for pumping now amounts to 60 per cent of the total operating expenses of the plant. The water use for 1915 totaled 591 gallons per capita per day. This is found to be an excessive use in comparison with towns of similar population and location where metering has been rejected to. If a reduction in the use of water is brought about there should be a corresponding reduction in the power bill and operating expenses. With rates based on the costs of service, it is evident that the interest of the consumer lies in the installation of meters. A provision governing the installation of meters should be embodied in rules and regulations to be filed with the Commission."

25 The Commission finds that the installation of meters in the present case would tend to prevent waste, eliminate discrimination, increase the revenue and operating expenses of the Gas Company, and lessen the burden of the consumers by reducing expenditures which it would be necessary for them to make for gas in order to allow the company to make a return on its investment and to take care of depreciation.

The order made herein therefore will require the Gas Company to install meters and the consumers to pay for gas on the meter basis.

The remaining questions to be decided are whether or not the gas Company is securing sufficient to take care of depreciation and to make a return on its investment, and whether the rates in effect are discriminatory in any other respects than those already pointed out.

Both the gas company and the city went to the expense of employing accountants to assist in getting the testimony in shape and in presenting it to the Commission.

Original Investment.

According to the company's figures the total amount expended, including producing gas wells, dry holes, oil well, the cost of the town plant, etc., is $127,770.21. The figures of the city for drilling expenses, taken from the books of the company, do not agree with those of the company. The original cost of the wells, as given by the city, is $73,436.10. This amount as given by the applicant is $82,333.01. From this figure the city subtracts $21,173.40, the amount charged to profit and loss on account of dry holes and shows the net investment in wells to be $61,159.61. The total number of wells drilled is given by the gas company as twenty-one. There are 13 producing gas wells, one oil well and seven dry holes. The original cost of the city plant is given by the gas company at $45,-437.20. This amount is not diputed. No separate figures are given as to cost of organization, franchise, etc. We presume therefore that these amounts are included in the figures given.

Condition Per Cent of Company's Property.

Witnesses testified that the average life of pipe in the city of Pawhuska, should be about fifteen years, and that the company's lines have been in use an average of seven years. Witness for the city estimated the present value of wells and equipment at $40,-000.00. Considering the fact that these wells have been producing for from one year to something like thirteen years, and that the average rock pressure of the field, as shown by the company's exhibit F, has declined from 613 pounds open flow, November, 1912, to 188 pounds in December, 1916, and that the production, as shown by the same exhibit has declined from 81,000,000 cubic feet for eight wells, January, 1914, to 34,000,000 cubic feet for thirteen wells December 14, 1916, the estimate of $40,000 given by witness for the city is probably a fair allowance for value of wells and equipment.

Fifteen years was given as the average life of pipe in the company's plant, and it was estimated that this pipe has been in place an average of seven years. The original cost was shown to be $32,-373.42. If the pipe has depreciated seven-fifteenths, the present cost as effected by condition per cent and not taking into consideration advance prices, would be $19,522.32; and of the entire plant, $28,355.10, (depreciation not being shown on the amount of $8,832, including real estate).

26 Present Fair Value of Lease, Wells, and Field Equipment.

The value of the company's lease cannot be limited to condition per cent of producing wells. The testimony shows that more gas

from this lease is sold to the Wichita Pipe Line Company at 6½ cents per thousand cubic feet than is sold through the city plant at Pawhuska. The lease, therefore, has a value in excess of that which would be estimated on merely serving the city of Pawhuska. It is impossible to estimate this value because the life of the field can only be approximated. It is possible that even if the rock pressure continues to decline at rate heretofore shown that compressor stations will be put in somewhere in the vicinity of the field so that the gas company can secure the benefit thereof and get gas pumped from its wells. The company also has undeveloped territory some few miles from the City of Pawhuska. Considering condition per cent of the producing wells and investment therein and the value of the lease, the book value of the company of $61,159.61 is perhaps not far wrong as a basis for present fair value and value for rate making purposes of the lease, wells and field equipment.

Going Concern.

Although this Commission is averse to making a separate allowance for the item of going concern, it recognizes that this element of value has been considered by other commissions and by courts, and, in valuing property for rate making purposes, it will therefore consider the property as a going property and will recognize this element in making up the total figures.

Working Capital.

The Commission has heretofore estimated one-twelfth of the operating expenses as an allowance which may be made for working capital. See City of Mangum vs. Mangum Electric Company, cause 1927, Order 1065, P. U. R. 1916E, 764. Witness for the city estimated operating expenses $25,939.54; Witness for the company at $33,508.68. The difference is due chiefly to the figure used for the cost of gas. Witness for the city placed this cost at .848 cents per thousand cubic feet plus the royalty of three cents for domestic gas and two cents for industrial gas; witness for the company at 5 cents, including royalty. There is also a small difference due to the amount allowed for shrinkage. Witness for the city estimated shrinkage at 17.5 per cent and witness for the gas company at 20 per cent of the amount supplied to the city plant. Witness for the gas company has estimated the value of gas at 2 cents per thousand cubic feet at the well.

The gas company controls both the production and the distribution and the Commission cannot therefore allow the company to capitalize something which it does not pay money for by fictitiously setting up a division of the company into two elements of production and distribution. $3,000.00 should be a sufficient allowance for working capital.

Other Elements which must be taken into consideration in fixing amount on which a return should be allowed:

As heretofore pointed out, there are 807 domestic consumers in

the City of Pawhuska; 90 consumers, all classes, are using gas through meters; 84 domestic consumers are on meters. There it will be necessary for the company to install 723 additional meters. The cost of purchasing and installing these meters will be about $8.00 each, or $5,764.00 for the 723 meters.

Revenues.

27 Witness for the gas company has estimated the amount of revenues of city plant at $25,212.96; witness for the city $28,983.12. Witness for the city estimated the cost of producing gas at .848 cents per thousand cubic feet; witness for the company at 2 cents per thousand cubic feet. Two cents per thousand cubic feet is not an excessive allowance for the production of gas in a rapidly declining field. The Commission at one time had in mind issuing a general order providing that no gas should be sold at less than four cents per thousand cubic feet at the mouth of the well. An order of this kind would have had a tendency to increase the incentive for the conservation of natural gas and would nave given an added inducement to the expenditure of the necessary money for the development of fields and the bringing in of additional gas wells.

Apportionment of Revenues and Expenses to the City Plant.

The testimony seems to have been presented on the theory that the Commission would make rates based on the cost of gas at the city gates, considering the production as though carried on by a separate company. Therefore no attempt was made by the Gas Company to allocate revenues and expenses and to assign the proper amount to the city plant and outside operations. Witness for the gas company testified that in December, 1916, about 2,000,000 cubic feet of gas was being supplied to the city and about 5,000,000 to the Wichita Pipe Line Company; that he instructed that the pipe line be allowed to purchase not more than four and one-half million. An apportionment, therefore, on the basis of sale, of one-third of the value of the wells and equipment, lease, field lines, and field operating expenses to the city plant would seem to be about right. Exhibit No. 4, filed on behalf of the city, shows that the field operating expenses are $32,521.26. One-third of this amount would be $10,840.42.

Portion of Value of Wells and Equipment and Lease Chargeable to Capital Account of City Plant.

On the above basis, the amount chargeable to capital account in the city plant would be one-third of $61,159.61, or $20,386.54.

Shrinkage.

The city has allowed for the item of shrinkage 17.5 per cent; the Gas Company 20 per cent of the amount delivered to the dis-

tributing plant. This is of course only an estimate as there is no way of computing shrinkage of gas sold to consumers without metering.

Evidence taken in the other cases shows that shrinkage has amounted to from 15 to 35 per cent. The Kansas Utility Commission has allowed from 30 per cent for small distributing plant to 20 per cent for the largest distributing plants. Twenty per cent is not an unfair allowance until a test is made, after meters have been installed.

Expenses.

Witness for the gas company shows operating expenses for the city plant to be $33,508.68; witness for the city $25,939.54. The Gas Company's estimate of the cost of gas is 1.152 cents per thousand cubic feet in excess of the city's estimate.

28 The amount of gas which would be consumed in one year, according to the estimate of witness for the city, is 302,828,000 cubic feet and according to the estimate of witness for the Gas Company 345,371,000 cubic feet. If the Commission were to accept the city's figures of $25,939.54 as the operating expenses of the city plant and would add thereto $10,840.42, one-third of the operating expenses for the field, the total operating expenses would be $36,779.96.

Amount on Which Returns Should be Allowed.

Returns should therefore be allowed on the following:

Book value of city plant as shown by condition per cent	$28,355.10
One-third value of wells and equipment and lease.....	20,386.54
Working capital	3,000.00
Cost of new meters.....	5,764.00
Total	$57,505.64

Rates Which Should be Charged for Gas in the City of Pawhuska.

It is therefore evident that the present rates are not sufficient to allow a return on the investment. The franchise granted by the city of Pawhuska to the gas company, ordinance No. 201, Section 9, provides in part as follows: "Nothing herein shall be construed to require said grantee, its successors or assigns to furnish gas as above if the supply of natural gas shall become exhausted or insufficient to supply the demand or if the expense of obtaining or furnishing same should become so great that the grantee cannot furnish gas at the above prices without loss."

It is a difficult matter to fix a schedule of rates which will be fair to all parties concerned. Rates should be high enough to allow the company a reasonable return on its investment and to set aside an adequate amount for depreciation and depletion. On the other

hand consumers should not be charged rates high enough to pay unreasonable dividends to the company.

Discrimination.

The present schedule of rates in the city of Pawhuska is discriminatory in that lower rates are made to some industries than to others and in that gas is furnished free to certain institutions in the city of Pawhuska.

In the case of Leavenworth vs. Leavenworth City & Ft. L. Water Co., P. U. R. 1915 B, 611, the Kansas Public Utilities Commission ordered a water company to discontinue its practice of furnishing free service to a city and its schools on the ground that such service is unreasonable and discriminatory, and to meter all water used for such purposes and to charge the same rates for it imposed upon other users of like class and quantity.

In the case of City of Newark vs. Public Service Electric Company, 16 C. L. 646, the New Jersey Board of Public Utilities Commissioners held that it would be a discrimination in favor of the city if the consumption of gas and electricity in all public buildings should be treated as if supplied through one installation, thus entitling the city to larger discounts than other consumers.

29 In the opinion of this Commission it is a mistake to allow a reduced rate to public institutions, as a general proposition. Somebody must eventually pay for the commodity furnished and for the service rendered. When gas is furnished to public institutions free, instead of being paid for by the city property owners escape taxation in the amount which would be paid for gas if charged for as to other consumers; but the deduction from the returns of the gas company must be made up in gas rates paid by other consumers. This added burden will fall most heavily on the small consumer.

As has been stated, gas is being furnished free to the city, public schools and churches (R., p. 9) under the terms of the franchise. This provision for free gas was undoubtedly one of the inducements held out to the city for granting the franchise. While free gas for the city and these institutions is discriminatory as to other consumers, the Commission will not at this time interfere with the arrangement. The city has its own gas well and the amount which the gas company will be compelled to furnish may not be great. All gas for such purposes must be metered and a monthly record kept showing meter readings for each installation and each class of service. The Commission does not recognize the provision of the franchise in reference to free gas as binding on it or as controlling in reference to its orders, and if it is found from the records kept that the furnishing of free gas is inequitable or conducive of waste the arrangement will be discontinued.

30 *Order.*

The Commission having reviewed the evidence herein, having made its findings of fact, and being fully advised in the premises, it is therefore ordered that natural gas rates in the City of Pawhuska shall be as follows:

First 50,000 cu. ft. used by any consumer during any one month, 25 cents per M. cu. ft., with a discount of 5 cents per M. cu. ft. if paid within ten days after bill is rendered.

Next 50,000 cu. ft. used by any consumer during any one month, 20 cents per M. cu. ft. with a discount of 3 cents per M. cu. ft. if paid within ten days after bill is rendered.

Next 100,000 cu. ft. used by any consumer during any one month, 16 cents per M. cu. ft. with a discount of 2 cents per M. cu. ft. if paid within ten days after bill is rendered.

Next 300,000 cu. ft. 13 cents per M. cu. ft. with a discount of 2 cents per M. cu. ft. if paid within ten days after bill is rendered.

All over 500,000 cu. ft. 10 cents per M. cu. ft. net.

Provided, that this schedule of rates shall not apply to gas heretofore furnished free to public schools, churches, and the City of Pawhuska.

It is further ordered that all gas furnished or consumed shall be through meter and that the company shall install standard meters for all consumers in the City of Pawhuska.

It is further ordered that the Pawhuska Oil & Gas Company shall install meters for measuring the amount of gas furnished free to schools, churches, and the City and that a separate meter shall be installed for each church, school building or class of service furnished free, and that a monthly record shall be kept showing meter readings for each installation and for each class of service, and that a copy of such record shall be furnished each month to the Corporation Commission.

It is further ordered that in the event there is insufficient gas at any time to supply the demands of all consumers, preference shall be given those using gas for domestic purposes.

The Company shall have the right to require a deposit from all consumers equal to the estimated consumption for forty-five days and to cut off the service from any consumer who fails to pay his bill within fifteen days from the rendition thereof.

It is further ordered that the Pawhuska Oil & Gas Company shall keep a meter record of all gas furnished to the City distributing plant, and that it shall compile and furnish to the Commission a record of such meter measurements of gas furnished to the City distributing plant and of gas furnished to the consumers
31 for a period of at least twelve months, for the purpose of determining the shrinkage or waste of natural gas from the time it is delivered to the City's distributing plant until it is measured through the customers' meters.

It is further ordered that the Pawhuska Oil & Gas Company, before the payment of dividends, shall set aside a depreciation or re-

placement fund based on the original cost and actual depreciation, and shall keep such fund intact in order to be able to replace therefrom depleted portions of the plant, or the entire plant, when it shall have become depleted. Further appeal to the Commission for relief will be dependent upon this being done.

The rates prescribed herein shall apply on all bills rendered for the month of April, 1917, and for all gas consumed during said month, and this order shall be in full force and effect in all respects and as to all of its provisions on and after April 24, 1917.

Done at Oklahoma City, this 14th day of April, 1917.

CORPORATION COMMISSION,
J. E. LOVE, *Chairman,*
W. D. HUMPHREY, *Commissioner,*
CAMPBELL RUSSELL,
Commissioner.

Attest:

J. H. HYDE,
Secretary.

32 In the Supreme Court of the State of Oklahoma.

No. 9084.

CITY OF PAWHUSKA, Plaintiff in Error,

vs.

PAWHUSKA OIL & GAS COMPANY and THE STATE OF OKLAHOMA, Defendants in Error.

Petition in Error.

Said City of Pawhuska, Plaintiff in error, alleges and shows to the Court, that at all times herein mentioned it was, and now is, a municipal corporation of the State of Oklahoma, and that on the 24th day of April, 1917, the Pawhuska Oil & Gas Company, Defendant in Error, obtained an order and judgment from the Corporation Commission of the State of Oklahoma, by the consideration of said Corporation Commission, and against this Plaintiff in Error, in an action or proceeding then pending before said Corporation Commission; that said order of the said Corporation Commission changes the terms of a written contract and franchise and right entered into between the City of Pawhuska and the Pawhuska Oil & Gas Company, thereby nullifying the said contract and franchise between the parties thereto. An original case-made and transcript of which order and judgment, and the pleadings and proceedings had in said proceeding and action in said Corporation Commission is hereto attached and made a part of this petition in error.

Said Plaintiff in Error, City of Pawhuska, alleges that there is

error in said judgment and order and proceedings, aforesaid, in this to-wit:

33 4. The Commission erred and violated section 10 of Article 1 of the Constitution of the United States in impairing the obligation of the contract of the City of Pawhuska with the Pawhuska Oil & Gas Company. (Case-made, pages 233, 241.)

Wherefore, the Plaintiff in error prays that the order and judgment of the Corporation Commission be reversed.

CITY OF PAWHUSKA,
By E. L. McCAIN AND
PRESTON A. SHINN,
Its Attorneys and Attorneys for Plaintiff in Error.

34 Supreme Court, July Term, 1917, July 31st, 1917, Twelfth Judicial Day.

No. 9084.

CITY OF PAWHUSKA

vs.

PAWHUSKA OIL & GAS CO. et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Rainey, J.

All the Justices concur.

35 Filed Jul- 31, 1917. William M. Franklin, clerk.

In the Supreme Court of the State of Oklahoma.

No. 9084.

CITY OF PAWHUSKA, Appellant,

vs.

PAWHUSKA OIL & GAS COMPANY and THE STATE OF OKLAHOMA, Appellee.

Syllabus.

1. Chapter 93, Session Laws 1913, entitled "An Act to extend the jurisdiction of the Corporation Commission over the rates, charges,

services and practice of water, heat, light and power companies, and to give said Commission general supervision over such utilities, and declaring an emergency," is repugnant to and in conflict with that part of Section 593 Rev. Laws of Oklahoma, 1910, conferring the power on cities of the first class to regulate by ordinance the prices to be paid for gas or lights, and operates as a repeal thereof.

2. Where two statutes cover the same subject and the statute last adopted is repugnant to and irreconcilable with the provisions covering the same subject in the first statute, the latest expression of the Legislature will govern.

3. Section 18, Article 9 of the Constitution did not confer upon the Corporation Commission jurisdiction and power to fix rates for a gas company furnishing gas within the limits of a city under franchise from the city.

4. By Chapter 93, Session Laws 1913, jurisdiction is conferred upon the Corporation Commission over all public utilities with the power to fix and establish rates and prescribe rules, requirements and regulations affecting their services and operation and the management and conduct of their business, and under the powers thus conferred, the Commission is vested with authority to make all valid and lawful orders prescribing rates, which the state, in the exercise of its sovereign capacity, could prescribe or make.

36 5. The power to regulate the charges for public services by municipal corporations is the power which it was the intention of the framers of the Constitution should be exercised by the sovereign power only. Such power is inherent in the state and is a necessary attribute of sovereignty. No specific authority having been conferred by the Constitution upon cities to fix and regulate the charges for gas in municipalities, the Legislature had the right to legislate thereon whenever in its judgment the public interest required such action. The power delegated to the City of Pawhuska to regulate charges for light and gas under Section 593 Rev. Laws of Oklahoma, 1910, was such a grant of power as could be taken away from said city by the Legislature and conferred upon the Corporation Commission, as was done by Chap. 93, Session Laws 1913. The order of the Corporation Commission establishing rates for gas to be charged consumers in the City of Pawhuska by the Pawhuska Oil & Gas Company, and requiring the installation of meters is a valid order under said act, and said order of the Commission is not repugnant to Section 15, Art. 2 of the Constitution of Oklahoma, nor to Section 10, Art. 1 of the Constitution of the United States.

6. Section 7, Art. 18 of the Constitution of Oklahoma, expressly prohibits the surrender by the legislative branch of the state government of the power to regulate the charges for public services.

7. The provision in the Act of April 2, 1915 (Laws 1915, Chap. 200, p. 407) "that this act shall not abrogate any existing contract, or affect or change the terms or conditions of any franchise granted by any municipal corporation prior to and in effect April 28, 1913," merely qualifies the direct Legislative mandate of that act to "all persons, firms or corporations furnishing gas in all mu-

nicipalities having a population over five hundred to do so through standard meters at meter rates," and does not affect the power of the Corporation Commission under the provisions of the Act of March 25, 1913 (Laws 1913, Chap. 93, p. 150), to establish rates not inconsistent with such direct mandate.

8. Evidence in this case examined and held: 1st. The findings of fact by the Corporation Commission are reasonably supported by the evidence, 2nd. The presumption that the order of the Commission is prima facie just, reasonable and correct is not overcome by the evidence.

Appeal from an Order of the Corporation Commission.

Affirmed.

37 E. L. McCain and Preston A. Shinn, for Appellant.

Leahy & McDonald, for Appellee, Pawhuska Oil & Gas Company.

S. P. Freeling, Att'y General; J. S. Harrison, Ass't Att'y Gen.; Paul A. Walker, Counsel for Corp. Comm., for State.

Frank N. Watson, Amicus Curiæ.

38 In the Supreme Court of the State of Oklahoma.

No. 9084.

CITY OF PAWHUSKA, Appellant,

vs.

PAWHUSKA OIL & GAS COMPANY and the STATE OF OKLAHOMA, Appellee-.

Opinion of the Court by

RAINEY, *J.*:

The City of Pawhuska is a city of the first class, and in November, 1909, the voters of said city, by initiative petition, granted to the Pawhuska Oil & Gas Company a franchise for twenty-five years, authorizing said company to use the streets and alleys of the City for the purpose of laying its gas pipe lines for furnishing the city of Pawhuska and the inhabitants thereof with natural gas. The franchise, among other things, provided that

"Said grantee shall furnish natural gas to the citizens, at a reasonable rate, which shall in no case exceed fifteen cents per one thousand cubic feet of gas, as registered by standard meters for the measurement of natural gas, said meters to be furnished by and be the property of grantee, or at a flat rate at the option of the consumer, which said flat rate shall in no case exceed the following prices, to-wit: * * *."

Then follows the schedule of rates.

From the time of the granting of said franchise up to the present

time the gas company has furnished gas under the terms of the franchise to the City of Pawhuska and its inhabitants. While said company, under said franchise, was furnishing gas both at a flat rate and through standard meters, at meter rates, the Legislature, on
39 April 28th, 1913, passed an act requiring all persons, firms or corporations furnishing natural gas in municipalities of the state to the inhabitants thereof to do so through standard meters at meter rates. Chapter 152 Session Laws 1913. The Pawhuska Oil & Gas Company undertook to install standard meters for furnishing gas to the inhabitants of the City of Pawhuska under the provisions of said statute, and desiring to take advantage of the benefits of the law, notified its consumers of its intention so to do. Some of the inhabitants of said city and the city instituted an action in the District Court of Osage County, Oklahoma, seeking to enjoin the gas company from complying with the provisions of said law and from taking advantage of the benefits thereof. The District Court granted the injunction, from which action an appeal was prosecuted by the company to this court. The judgment of the District Court was reversed, this court holding that the police power of the state to police the business of distributing gas in said municipality was reserved by Section 7, Article 18, of the Constitution, and that the passage of said act was a proper exercise of such power. Pawhuska Oil & Gas Company v. City of Pawhuska, et al., — Okla. —, 148 Pac. 118.

While said cause was pending in this court the Legislature passed an act, (Chap. 200, p. 407, Sess. Laws 1915), approved April 2nd, 1915, amendatory of Chapter 152, Session Laws 1913, requiring the furnishing of natural gas in municipalities in the state to the inhabitants thereof through standard meters at meter rates. This latter act contained a proviso, which will be hereinafter discussed.

The 1913 Legislature passed another act, (Chap. 93, p. 150, approved March 25th, 1913), conferring upon the Corporation Commission general supervision over all public utilities. Section 2 of said act reads as follows:

"Section 2. The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to pre-
40 scribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. It shall have full visitatorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission."

On November 16th, 1916, the Pawhuska Oil & Gas Company applied to the Corporation Commission for authority under the provisions of Chap. 93, Session Laws 1915, to raise its rates for gas in

the City of Pawhuska. The City of Pawhuska appeared and moved for a dismissal of said application, upon the ground that the Commission was without jurisdiction to raise the rates. This motion was overruled by the Commission and exceptions saved by the city, whereupon the city filed its answer to the application of the gas company, in which answer the jurisdiction of the Commission in this particular proceeding was again challenged. A hearing was had before the Commission in January, 1917, as a result of which the Commission issued its order increasing the rates theretofore charged the customers of said company in the City of Pawhuska, and requiring that all gas sold to the company's consumers in said municipality should be sold through standard meters, requiring the company to install such meters, and further providing that the gas company should discontinue the sale of gas at a flat rate. From this order of the Commission the City of Pawhuska brings the case here.

It is first urged by counsel for appellant that if Chapter 93, Session Laws 1913, conferred jurisdiction upon the Commission to fix and establish rates for public utilities that said act did not apply to cities of the first class, for the reason, as it claims, that at the time of the passage of said act that Section 593 Rev. Laws of Oklahoma, 1910,

41 (the pertinent parts of which are identical with Section 398, Statutes of 1903), authorized said cities to regulate by ordinance the rates to be charged by gas companies, and that said act was not repealed by the act conferring jurisdiction on the Commission. Section 593 Rev. Laws of Oklahoma, 1910, supra, reads as follows:

"The council may provide for and regulate the lighting of the streets, the erection of lamp posts, and the council shall have power to make contracts with and authorize any person, company or association to erect gas or electric works in said city and give such person, company or association the privilege of furnishing gas or electricity to light the streets, lanes and alleys of said city for any length of time, not exceeding twenty-five years. But no such grant shall be so conditioned as to prevent the council from granting to other persons or companies or corporations the right to use the streets for like purposes under the provisions of Sections 5*a* and 5*b* of Article XVIII of the Constitution; and all such grants shall be subject at all times to reasonable regulations by ordinance as to the use of streets and prices to be paid for gas or lights."

The pertinent parts of the above section were in the Territorial Statutes on the date of the adoption of the Constitution, and at the time the franchise was granted the Pawhuska Oil & Gas Company by the City of Pawhuska.

While it may be true, as contended by appellant, that Section 593, supra, conferred upon the City of Pawhuska the power to change the rates prescribed by franchise to be charged for furnishing gas to the City of Pawhuska and the inhabitants thereof, we cannot agree with counsel that the act conferring jurisdiction on the Corporation Commission did not take such right away from the City of Pawhuska and all other cities of the first class. In support of their contention counsel for appellant states that said act did not refer in any way to

the repeal of Section 593 Rev. Laws of Oklahoma, 1910, supra, and insists that said act is not inconsistent with the provisions contained in Section 593.

The title of the act conferring jurisdiction upon the Commission is as follows:

"An act to extend the jurisdiction of the Corporation Commission over the rates, charges, services and practice of water, heat, light and power companies, and to give said commission general supervision over such utilities, and declaring an emergency."

42 The language of Section 2 of said act, supra, could hardly be more comprehensive. Concededly repeals by implication are not favored, but it is also well settled that the Legislature may, within constitutional limitations, express its will in any form it sees fit, and a repeal is effected where the intent to repeal is clearly evidenced; and where two statutes cover the same subject and the statute last adopted is repugnant to and irreconcilable with the provisions covering the same subject in the first statute, the latest expression of the Legislature will govern. Where the conflict is irreconcilable on the subject covered by both statutes the old law is repealed by implication to the extent of the repugnancy, but no further. The two statutes under consideration cannot stand, for the reason that the power to regulate the rates to be charged for gas by the Pawhuska Oil & Gas Company cannot exist and be exercised by the City of Pawhuska and the Corporation Commission at the same time, and it was clearly the intention of the Legislature that the Corporation Commission should have "supervision over all public utilities with power to fix and establish rates". The act conferring such jurisdiction on the Corporation Commission is repugnant to that portion of Section 593 Rev. Laws of Oklahoma, 1910, purporting to confer such authority on cities of the first class, and said Section 593 is repealed to that extent. It is proper in determining the intention of the Legislature to effect repeals to take into consideration the established policy of the Legislature as disclosed by a general course of legislation. The act conferring jurisdiction on the Corporation Commission, with power to regulate charges for public services for gas is in harmony with the established policy of the Legislature to conserve gas as one of the natural resources of the state, which policy is evidenced by what is known as the "Conservation Act", approved March 30th, 1915, Chapter 197, Session Laws, 1915.

It seems to us that it cannot be seriously contended that said Section 593, in so far as it delegated the power to cities to regu-

43 late rates or charges for public services, was not repealed by implication.

In the case of Guthrie Gas, Light, Fuel & Improvement Company, and Oklahoma Natural Gas Company v. The Board of Education of the City of Guthrie, State of Oklahoma, et al., decided May 15th, 1917, (not yet officially reported), we held, in an opinion by Mr. Justice Hardy, that said act did confer jurisdiction on the Corporation Commission to regulate the charges for gas over all public utili-

ties in municipalities such as the business of the appellee company in this case. The syllabus reads:

"By Chapter 93, L. 1913, jurisdiction is conferred upon the Corporation Commission over all public utilities with the power to fix and establish rates and prescribe rules, requirements and regulations affecting their services and operation and the management and conduct of their business, and under the powers thus conferred, the Commission is vested with authority to make all valid and lawful orders prescribing rates, which the State, in the exercise of its sovereign capacity, could prescribe or make."

While in that case the claim was not made, as it is here, that said act did not apply to cities of the first class, we did apply the act to the City of Guthrie, a city of the first class, and we think correctly so.

It is next contended that if the act conferring jurisdiction on the Commission operated as a repeal of that part of Section 593 Rev. Laws of Oklahoma, 1910, that empowered municipalities to regulate charges for public services, and was intended to apply to cities of the first class that said act is in conflict with Section 18, Article 9, of the Constitution, and is therefore null and void. In support of this contention it is argued that the franchise granted to appellee falls within the proviso of Section 18, Article 9, of the State Constitution, and that said contract having been entered into prior to the passage of the act conferring jurisdiction upon the Commission in such cases that said contract was protected by the terms of said proviso, notwithstanding that this particular question was decided adversely to the contention of appellant in the case of Shawnee Gas & Electric Com-
44 pany v. Corporation Commission, 35 Okla. 454, 130 Pac. 137. We are asked to recede from our holding in that case. Out of deference to the earnestness with which counsel have presented this question we have read all the authorities cited in the briefs, have re-examined the opinion in said case and after a most careful consideration we have concluded that the construction placed by the court upon the proviso in Section 18, Article 9, was correct. Construing said proviso Mr. Justice Turner, speaking for the court, said:

"We are therefore of opinion that gas companies are not within the purview of the enactments under construction, but, as to the fixing of their rates, were purposely left to be dealt with by the Legislature. In other words, all that part of the section within said proviso inhibits a construction of said section that will confer upon the commission authority to fix rates for a gas company furnishing gas within the limits of a city under franchise from the city, and that, too, whether the city has authority conferred upon it by Comp. Laws, 1909, sec. 693, to regulate rates and charges therefor or not. This construction does not leave this proviso without a subject upon which to operate. For what of the numerous street railway and telephone lines, and perhaps other public service corporations, whose rates had been fixed by similar franchises granted by the cities, towns, and counties throughout the state prior to the adoption of the Constitution? These, it would seem, fall within the proviction of the proviso, but not the petitioner company for the reasons stated."

The next question raised is that the order of the Corporation Commission is void, for the reason that it impairs the obligations of the contract entered into between the Pawhuska Oil & Gas Company and the City of Pawhuska, and is therefore repugnant to Section 15, Article 2 of the Constitution of Oklahoma, and to Section 10, Article 1 of the Constitution of the United States, prohibiting the passage of any law impairing the obligation of contracts. The authority granted to the City of Pawhuska in this case, under Section 393 Rev. Laws of Oklahoma, 1910, to fix and regulate the charges for gas furnished the inhabitants of said city was the power delegated to it by the state, and said city only had such right until such time as the state saw fit to exercise its paramount authority directly by a law enacted by the people through the initiative and referendum or the state legislature, or indirectly by that legislative subdivision of the government having such power by virtue of its delegation by the supreme legislative authority. By Chapter 93, Session Laws 1913, such power was delegated to the Corporation Commission, No specific authority having been conferred by the Constitution upon cities to fix and regulate the charges for gas in municipalities, the right existed in the state to withdraw the power delegated to the municipalities whenever, in the judgment of the Legislature, the public interest required it. There are numerous authorities to this effect.

The power of the Railroad Commission of the State of Wisconsin to fix rates was involved in the case of the City of Manitowac v. Manitowac and Northern Traction Company, 129 N. W. 925. Speaking of this question the Supreme Court of Wisconsin said:

"No specific authority having been conferred on the city to enter into the contract in question, the right of the State to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the State saw fit to exercise its paramount authority, and no longer. To this extent and to this extent only is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting Section 1862 or Section 1863, St. 1888, the State intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the State saw fit to act."

There is an instructive and interesting discussion of this power of sovereignty in the case of Pioneer Telephone & Telegraph Co. v. State, 33 Okl. 724, 127 Pac. 1073. Mr. Justice Turner, speaking for the court, said:

"In State ex rel. Wisconsin Telephone Co. v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657, the court speaking of this power, said that it was inherent in the state and a necessary attribute of sovereignty; that it does not pass to a mere subdivision of government except by express grant or by necessary implication from other powers granted; that every citizen holds his property subject to the proper exercise of this power, either by the state Legislature direct or by a public or municipal corporation to which the Legislature may delegate it. Citing 1 Dill. Mun. Corp. Sec. 141. Speaking to the point there in question, the court said:

'No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power from which such authority can necessarily be implied. Construing the charter and the statute in the light of the rules of law stated, the city
46 has authority to exercise its police power to protect the public from unnecessary obstructions, inconveniences, and danger and to determine in what manner the relator may erect its poles so as to accomplish this result. Michigan T. Co. v. Benton Harbor, 121 Mich. 512, (80 N. W. 386, 47 L. R. A. 104). It has no authority to impose other conditions. That power rests in the Legislature. The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them.' "

In the same opinion we quoted with approval from a very able discussion of this power of sovereignty in the case of Home Tel. Co. v. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, wherein the Supreme Court of the United States said:

"The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation. * * * The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme Legislature (in this case, the Legislature of the state) has the authority to make such a surrender unless the authority is clearly delegated to it by the supreme Legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court which will be referred to hereafter, and we need not delay further upon this point. It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract, is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizen's Street R. Co., 184 U. S. 368, 382 (22 Sup. Ct. 410), 46 L. Ed. 582, 605; Vicksburg v. Vicksburg Waterworks Co., 208 U. S. 496, 508, 27 Sup. Ct. 762, 51 L. Ed. 115, 116. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

In South McAlester-Eufaula Telephone Co. v. State, 25 Okl. 524, this court, in an opinion by Mr. Justice Kane, said:

"That the power to regulate the charges for public service by municipal corporations is a power which it was the intention of the framers of the Constitution should be exercised by the sovereign

power only is further evidenced by Section 7 of Article 18
47 of the Constitution, entitled 'Municipal Corporations,' which provides that:

'No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality shall divest the state or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public service be surrendered, and no exclusive franchise shall ever be granted."

While it is held in Home Telephone Company v. Los Angeles, supra, that in well defined cases a surrender by contract of the power of government may be made by legislative authority, such a surrender cannot be made where prohibited by the Constitution, and Section 7, Article 18 of the Constitution expressly prohibits the surrender by the legislative branch of our state government of the "power to regulate the charges for public services."

It is next contended that if the corporation commission had jurisdiction to regulate the rates to be charged for gas in the City of Pawhuska subsequent to the taking effect of Chapter 93, Session Laws 1913, conferring such jurisdiction, that said jurisdiction was taken away from the Commission by the meter act approved April 2nd, 1915, (Chap 200, p. 407, Session Laws 1915), which act was amendatory of the meter act approved April 28th, 1913, (Chap. 152, p. 309, Session Laws 1913), requiring all persons, firms and organizations engaged in the business of furnishing natural gas to the inhabitants of municipalities to do so through standard meters at meter rates. The second proviso of the act of April 2nd, 1915, reads as follows:

"Provided further, that this act shall not abrogate any existing contract, or affect or change the terms or conditions of any franchise granted by any municipal corporation prior to and in effect April 28, 1913."

The franchise granted by the City of Pawhuska to the Pawhuska Oil & Gas Company was in effect April 28th, 1913, and counsel for appellant insists that by virtue of the terms of the above proviso that the prices charged for gas under the franchise could not be affected or changed. In answer to this argument counsel for Paw-
48 huska Oil & Gas Company say, in effect, that inasmuch as appellee attempted to take advantage of the benefits accorded it by the act of April 28th, 1913, and was prevented from so doing by the action of appellant in securing an injunction in the District Court of Osage County, that said act of April 28th, 1913, conferred upon said gas company a vested right which could not be abrogated by the terms of the proviso of the act of April 2nd, 1915.

We do not think the meter act of April 28th, 1913, conferred such a right upon the Pawhuska Oil & Gas Company to have meters installed and to charge at meter rates that could not be amended or repealed by the Legislature at any time, and the fact that the appellee had not installed meters in pursuance to the provisions of said act, because prevented by the injunction suit, in our opinion, did not prevent the Legislature from repealing the act so far as it applied to

the City of Pawhuska, which it did by the terms of the proviso in the meter act approved April 2nd, 1915. The question then arises, did the corporation commission, notwithstanding this proviso in the meter act of April 2nd, 1915, and independently of said act, have the power to fix the charges for gas and to require the installation of meters as impliedly incidental thereto. The act of April 2nd, 1915, as well as the act of April 28th, 1913, is a direct mandate from the Legislature requiring all persons, firms or corporations furnishing gas in municipalities having a population over five hundred to do so through standard meters at meter rates, but by the terms of the proviso in the act of April 2nd, 1915, supra, the act does not apply to contracts and to franchises granted by municipal corporations prior to and in effect April 28th, 1913, where the installation of said meters and the charging at meter rates would abrogate the contract, or affect or change the terms or conditions of the franchise, and as the City of Pawhuska had granted such a franchise in effect on said date said franchise is not affected by the meter act.

However, we do not regard the meter acts as repugnant to or in conflict with the act conferring jurisdiction upon the Cor-
49 poration Commission, but as supplementary thereto. In other words, the act conferring jurisdiction on the Corporation Commission to fix the charges for gas gave the Corporation Commission authority to proceed to establish rates if it saw fit but said act did not compel action on the part of the Commission. But whether the Corporation Commission established rates or not by the terms of the act of April 28th, 1913, requiring the installation of meters, all persons, firms or corporations furnishing gas to consumers in the municipalities therein specified were required so to do, and to charge at meter rates. The meter act approved April 28th, 1913, did not attempt to fix the rates, and the act approved April 2nd, 1915, was to the same effect, except that said act was not applicable to certain franchises above mentioned, and in the absence of an order from the Corporation Commission fixing the rates and requiring the installation of meters, the persons, firms or corporations furnishing gas in cities having such franchises were not required to do so by virtue of the terms of the meter act. We think, however, that notwithstanding that by the terms of said meter act the persons, firms or corporations furnishing gas in said cities were not required to install meters and charge for gas at meter rates by legislative enactment, they were not excused from so doing if the Corporation Commission so ordered under the authority delegated to it by the act conferring jurisdiction on the Commission.

The meter acts were not applicable to towns having a population of less than five hundred, and we think it is beyond dispute that the Corporation Commission, by virtue of the authority conferred by the act approved March 25th, 1913, had the authority to regulate the rates and require the installation of meters in said towns. And by virtue of the proviso in the act of April 2nd, 1915, in addition to the persons, firms or corporations furnishing gas in towns having a population under five hundred not being required to install meters, persons, firms or corporations furnishing gas in cities such as the City of

Pawhuska, under franchises in effect April 28th, 1913, were also not required to install meters and to charge at meter rates, but we
50 do not think the proviso goes any further or confers any greater right. It places the City of Pawhuska, as regards the franchise granted appellee, in the same situation as are towns under five hundred. So we say there is nothing in the meter acts that can be construed to prevent the Corporation Commission from exercising the power delegated to it by Chapter 93, Session Laws 1913.

It is urged that the power of municipalities to regulate the charges of any public service corporation is protected by the proviso in Section 18, Article 9, of the Constitution, but as we have already seen, a public service company furnishing gas to the inhabitants of a municipality does not come within the terms of said proviso.

Shawnee Gas & Electric Co. v. Corporation Commission, 35 Okla. 454; 130 Pac. 137.

The second paragraph of Section 7, Article 18 of the Constitution reads:

"Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted."

This language is found in Article 18 of the Constitution, entitled "Municipal Corporations," and from this fact it is argued that as the City of Pawhuska had the power to regulate the charges for public service at the time of the adoption of the Constitution that the provision above quoted should be construed as an inhibition against the exercise of that power by the Corporation Commission or by the Legislature itself, and that the exercise of such power by the Legislature or the Commission would be tantamount to the surrender of the power by the city. We do not think the language susceptible of such construction. That part of Section 7, Article 18 above quoted prohibiting the surrender of the power to regulate the charges for public services is a limitation upon the supreme legislative power, as well as upon the subdivision of the State government to which such power is or may be delegated within constitutional limitations by the legislative branch of the government. It simply means that this power of sovereignty cannot be surrendered.
51 Such limitations upon the state and its subordinate sub-divisions can only be abrogated by repeal or amendment of Section 7, Article 18, of the Constitution.

In the case of the City of Pawhuska, v. Pawhuska Oil & Gas Company, supra, it was noted that the power to regulate the charges for public services was reserved to the city and the state. We there said:

"That said act was one of police regulation intended to prevent the waste of gas. The very act authorizing the city to grant this franchise is entitled "An act to regulate the use and preservation of oil and gas, * * *" and, stripped to the point, gives this and like companies authority to build pipe lines through the streets and alleys of the municipalities of this state with the consent and 'subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted.' Which

shows the intent of the state to be, in authorizing the municipality to grant this franchise, to reserve to the municipality, notwithstanding the terms of the franchise, the power to police the business of distributing gas thereunder in that municipality. This police power had theretofore been reserved both to the state and the city. Article 18, #7, of the Constitution provides:

'No grant, extension or renewal of any franchise or other use of the streets, alleys or other public grounds or ways of any municipality, shall divest the state, or any of its subordinate sub-divisions of their control and regulation of such use and enjoyment.'

Having been expressly reserved by said section of the Constitution to both the state and the municipality, and again expressly reserved to the city by the act authorizing the municipality to grant the franchise, the reservation of the power was as much a part of the franchise as if written therein. It follows that whether the franchise amounted to a contract between the city and the company we need not say, for, sure it is, the state, by the act complained of, had a right to say to the company, as it did, in effect, by the terms of said act, that in the interest of the conservation of the natural resources of the state, the company shall no longer be permitted to sell gas at a flat rate, but thereafter was required to furnish the same to its customers (with certain exceptions named in the act) through standard meters and at meter rates. And this was a proper exercise of police power."

It is strenuously insisted by appellant that there are many good reasons why the power to regulate charges for gas should be vested in the municipalities of the state rather than in the Corporation Commission, but it is well settled that the courts are not concerned with the policy of the law, and it is our duty to interpret the constitutional and legislative enactments as we find them. The
52 question of the advisability of conferring this power upon the Corporation Commission rested peculiarly within the sound judgment of the Legislature.

Natural gas is undoubtedly a public utility in which the state is intensely interested. This interest has been manifested in several legislative enactments, and it is now the established policy of our state to conserve natural gas, as is evidenced by what is known as the "Gas Conservation Act," Section 3, Chapter 197, Session Laws 1915.

The remaining question presented by the record is; "Was the order of the Commission fixing the rates to be charged the inhabitants of the City of Pawhuska for gas furnished by the Pawhuska Oil & Gas Company reasonable and just?" The Constitution provides that "the action of the Commission appealed from shall be regarded as prima facie reasonable, just and correct."

In Atchison T. & S. F. Ry. Co. v. State, et al., 23 Okl. 210, 100 Pac. 11, this court, in an opinion by Mr. Justice Williams, after reviewing the authorities, said:

"In the connection that the term "Prima Facie" is used in Section 22, Art. 9, supra, it is not contemplated that any additional evidence should be considered by the Supreme Court on review,

unless within the discretion of said court the cause should be remanded for further investigation. If no additional testimony is to be considered on appeal in the Supreme Court, reviewing the same in the same capacity as a legislative body, as held by the Supreme Court of the United States in the case of Prentis et. al. v. Atlantic Coast Line Co. et. al., supra, what is the effect of being "regarded as prima facie just, reasonable and correct?" It simply means that, in considering the testimony, and the record upon which the order was based, the presumption arises in the Supreme Court that the order thereon made is to be regarded as prima facie just, reasonable and correct, such presumption subject to be overcome by evidence that may be in the record that clearly rebuts same.

Such presumption arising in favor of the order, while a strong one, is not one of a conclusive character. It will give way to a fair exhibition of the contravailing evidence in the record. The presumption given by this provision in favor of the Commission's order belongs to that class of prima facie orders or presump-
53 tions that are rebuttable, and will yield to the legitimate recitals of the record or the probative force of the evidence in the record. It casts upon the appellant the burden of making it clearly appear to the reviewing body that the order made by the Commission is erroneous. The Appellant cannot with hope of success ask the revising tribunal to overthrow the findings of the Commission upon vague inferences or remote possibilities. It will fail unless it overcomes the presumption by making error manifest. Elliot's Appellate Procedure, #711."

The evidence in this case is voluminous, and it would be impracticable to set it out in this opinion, but we have examined the record and find that the findings of fact of the Commission are reasonably supported by the evidence, and we are unable to say that the presumption that the order of the Commission is prima facie just, reasonable and correct, is overcome by the evidence.

As stated in the brief filed on behalf of the state, it is the duty of the Commission to allow an increase in rates where the facts show that such increase is justified, as well as a reduction in cases where the facts justify a reduction, which is the uniform holding of the Commission of other states. In the instant case the rates fixed seem to be as low as in other first class cities of the state. The rate as fixed by the Commission is twenty cents net per thousand cubic feet for domestic gas. The prevailing rates in some of the other cities are as follows: Ardmore, 30 cents (net); Bartlesville, 25 cents; Blackwell, 25 cents; Chelsea, 25 cents; Claremore, 25 cents; Collinsville, 25 cents; Cleveland, 25 cents; Dustin, 25 cents; El Reno, 26 cents (net); Choteau, 30 cents; Guthrie, 25 cents (net); Henryetta, 25 cents; Muskogee, 25 cents; Nowata, 25 cents; Oklahoma City, 25 cents (net); Newkirk, 25 cents (net); Okmulgee, 20 cents (net); Ponca City, 25 cents; Tonkawa, 25 cents (net); Sapulpa, 22.5 cents (net); and Shawnee, 25 cents (net). Thus it will be seen that the rate as fixed by the Commission for Pawhuska compares favorably with other first class cities, and under the order of the Commission the appellee is directed to continue to furnish

gas free to the City of Pawhuska for street lighting, city
54 buildings and public schools, as it had theretofore done under the franchise.

The case is therefore affirmed.

All the Justices concur except Kane, J., not participating.

55 SUPREME COURT, STATE OF OKLAHOMA, *ss:*

I, Wm. M. Franklin, clerk of said court, do hereby certify that there was lodged with me as such clerk on Aug. 31, 1917, in the matter of the City of Pawhuska vs. Pawhuska Oil & Gas Company, and The State of Oklahoma;—

1. The original bond of which a copy is herein set forth.

2. The original writ of error and three copies thereof,—one for each defendant, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Oklahoma City, Oklahoma, this 18 day of September, 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of Supreme Court of Oklahoma,
By N. C. ORR,
Ass't.

56 Know all men by these presents, That we, City of Pawhuska, Oklahoma, as principal, and Roger L. Hall and Edward H. Simpkins, as sureties, are held and firmly bound unto the Pawhuska Oil and Gas Company, and The State of Oklahoma, in the sum of Five Hundred Dollars, to be paid to the said Pawhuska Oil and Gas Company, and The State of Oklahoma, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 27th, day of August, 1917.

Whereas, the City of Pawhuska, Oklahoma, seeks to prosecute its writ of error to the United States Supreme Court to reverse a judgment rendered against it and in favor of the Pawhuska Oil and Gas Company, and the State of Oklahoma, on the 31st day of July, 1917, by the Supreme Court of the State of Oklahoma.

Now, Therefore, The condition of this obligation is such, that if the City of Pawhuska, Oklahoma, shall prosecute its writ of error to effect, and answer all costs that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

CITY OF PAWHUSKA,
By JAS. A. WEISELOGEL,
Commissioner of Public Affairs and Safety, Ex-Officio Mayor.
J. M. BUCKLEY,
Commissioner of Streets.
ROGER L. HALL. [SEAL.]
EDWARD H. SIMPKINS. [SEAL.]

Attest:

E. H. McMAHON,
Commissioner of Finance and Accounts, Clerk.

[SEAL.]

Approved Aug. 28, 1917.

J. F. SHARP,
Chief Justice Supreme Court of Oklahoma.

Filed in Supreme Court of Oklahoma Aug. 31, 1917. William M. Franklin, Clerk.

57 SUPREME COURT, STATE OF OKLAHOMA, *ss:*

I, Wm. M. Franklin, clerk of said court, do hereby certify that the foregoing pages are a true, full and complete transcript of the record and proceedings, in the case of the City of Pawhuska vs. Pawhuska Oil & Gas Company, and The State of Oklahoma, as the said transcript purports to contain, and as called for by the stipulation of the parties to the record above set forth, including a copy of the opinion of the Court rendered therein, as the same now appears of record on the books and files in my office.

I further certify that the original petition for writ of error, the original assignment of errors with prayer for reversal, the original writ of error and allowance thereof, the original citation, and the original stipulation of parties as to what shall constitute the transcript to be returned with the writ of error, are hereto attached and returned herewith.

In testimony whereof, I have hereto set my hand and affixed the seal of said Court, at my office in Oklahoma City, Oklahoma, this 18 day of September, 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of Supreme Court of Oklahoma,
By N. C. ORR,
Ass't.

Endorsed on cover: File No. 26,168. Oklahoma Supreme Court. Term No. 701. The City of Pawhuska, Plaintiff in Error, vs. Pawhuska Oil and Gas Company and The State of Oklahoma. Filed September 24th, 1917. File No. 26,168.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1918.

No. 281

The City of Pawhuska, Plaintiff in Error,

vs.

Pawhuska Oil and Gas Company,
and the State of Oklahoma,
Defendants in Error.

In Error to the Supreme Court of the State of Oklahoma.

Brief and Argument of Plaintiff in Error.

Preston A. Shinn,
Attorney for Plaintiff in Error.

Pawhuska Capital Print, Pawhuska Okla.

INDEX.

CASES.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

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vs.

Pawhuska Oil and Gas Company, and the State of Oklahoma,

Defendants in Error.

In Error to the Supreme Court of the State of Oklahoma.

Brief and Argument of Plaintiff in Error.

STATEMENT OF CASE.

This case is before this Court on Writ of Error to the Supreme Court of Oklahoma. The Federal question involved has to do with the contract clause of the Federal Constitution. The Plaintiff in Error city is operating under a charter not subject to change,

amendment or repeal by any authority other than the city. In 1909, the City of Pawhuska, under authority granted in the state constitution, entered into a franchise agreement with the Pawhuska Oil & Gas Company, the Defendent in Error, wherein the city granted to the Gas Company the right to use the streets, alleys, and public grounds of the city for the purpose of placing its mains, pipes, and fixtures, to the end that the Gas Company could supply the city and its residents with natural gas, and in consideration of the rights and privileges granted to the Gas Company by the city, the Gas Company agreed to furnish gas to the city and its residents at rates not in excess of those agreed upon in the franchise, and for a period not to exceed twenty-five years. The Gas Company, having used the streets, alleys and public grounds of the city for several years prior to the issuance of the franchise in distributing its natural gas, accepted of the terms of the franchise, and has been operating in the city under the franchise since 1909. (Printed Record, pages 6 and 16).

By Act of the Legislature (Session Laws 1913, Chapter 93, pages 150, 151), jurisdiction was conferred upon the State Corporation Commission to fix rates and charges to be paid for gas, by the consumers thereof, to the Defendant in Error, and others. The Gas Company made application to the Corporation Commission for permission to raise its rates and charges for gas sold to its consumers in the city of Pawhuska. The Gas Company alleged, among other things, (Printed Record, pages 6, 7 and 8), that it was a corporation;

that in 1904 and at all subsequent times it was the owner of a gas mining lease adjacent to the City of Pawhuska, from which gas lease it had since 1904 supplied the residents of Pawhuska with natural gas; that in 1906 Pawhuska was organized as a city of the first class; that in 1909 the residents of Pawhuska, by initiative petition, had granted a franchise to the said Gas Company, giving it the right to use the streets, alleys, and public grounds of said city, in selling gas to the residents thereof; that said franchise defined other rights and duties of the contracting parties, the frachise being attached and made a part of the petition; that in getting a renewal of its lease in 1916, the Company was required to pay a greater royalty for its gas than theretofore; that under the terms of its new lease the Company was required to sell its gas by meter; that the gas on its lease was most exhausted, and that it was necessary to search for and find another gas field at a great expense; and, that the Company was operating at a loss, and requested the Corporation Commission to allow it to raise its charges from fifteen cents per thousand cubic feet, to twenty-five cents per thousand cubic feet for its gas, sold in Pawhuska.

The City of Pawhuska answered, in substance, (Printed Record, pages 11 to 15): That it was a City of the first class under the laws of Oklahoma, and that as such city of the first class it entered into the contract with the Pawhuska Oil & Gas Company to supply the city and its inhabitants with natural gas; that any rights the Gas Company has in the streets,

alleys and public grounds of said city were vested in said Company by the franchise theretofore granted to said Gas Company by said city, and not because of any authority attempted to be granted in Section 12 of Article 2, Chapter 26, pp. 435, 436, of Session Laws of 1909; that a former judgment between the Gas Company and the City was a property right in each of said parties, and claimed the benefits thereof; denied that the Gas Company was loosing money; alleged that the franchise granted by the City and accepted by the Company was a contract between the parties thereto; that the City had authority to fix and regulate the rates and charges which the Gas Company would be permitted to sell its gas for to the residents of Pawhuska; that the Corporation Commission was without authority to fix the rates and charges to be paid for gas in the City of Pawhuska; that in the year of 1912, the citizens of Pawhuska adopted the Constitutional Charter Form of Government, provided for by the Constitution of said state, and that the City of Pawhuska under its new charter became the successor of the old and former City of Pawhuska, and entitled to, and vested with, all the rights, contracts, privileges, choses and property, including all ordinances of the former City of Pawhuska, said charter being made a part of said answer; that "The said City of Pawhuska alleges that the rights it obtained under the contract with the said Pawhuska Oil & Gas Company, for said City and the inhabitants thereof, and the obligations undertaken and promised by the said Pawhuska Oil & Gas Company to the City of Pawhuska and the inhabitants

thereof, in said contract, is a valuable property right to the said City of Pawhuska, and should not be impaired by the State of Oklahoma, by and through its laws, and its Corporation Commission; that in so far as the Utilities Act of 1913, being Chapter 93 of the Session Laws of 1913, by its terms, was, and is, intended to confer jurisdiction on the Honorable Corporation Commission to fix rates that the said Pawhuska Oil and Gas Company shall be permitted to charge for its gas under its contract with the City of Pawhuska, (the same) is void and unconstitutional as impairing the obligations of the contract between the said City of Pawhuska and the Pawhuska Oil & Gas Company, same being protected by section 10 of Article 1, of the Constitution of the United States, as well as Sec. 15, of Art. 11, of the Oklahoma Constitution."

By way of reply the Gas Company denied generally such parts of the answer which did not admit the statements contained in its petition. (Printed Record page 15).

FRANCHISE.

The material parts of the franchise are as follows:

"To the Honorable J. W. Stroud, Mayor of the City of Pawhuska State of Oklahoma.

"We the undersigned citizens and legal voters of the State of Oklahoma, and City of Pawhuska, order that the following proposed ordinance shall be submitted to the legal voters of the State of Oklahoma, City of Pawhuska, for their approval or rejection, at a special election to be held on the 12th day of October, 1909, and each for himself says: I have personally signed this petition; I am a legal voter of the State of Oklahoma and the City of Pawhuska. My residence and post-office addresses are correctly written after my name. The time for filing this petition expires in three months from the 12th day of August, 1909.

The question we herewith submit to our voters is: — Shall the following ordinance be adopted?

"An ordinance granting to the Pawhuska Oil & Gas Company of Pawhuska, Oklahoma, a corporation organized under, and by virtue of the laws of the Territory of Oklahoma, its successors and assigns, the privilege of acquiring, constructing, operating and maintaining a gas plant, mains, pipes and appurtenances in streets, alleys and public grounds of said city, for the purpose of supplying natural gas to the said city and the inhabitants and concerns thereof, and defining the rights and privileges thereunder.

"Be it ordained by the people of the City of Pawhuska, Oklahoma:

"Section 1. That the Pawhuska Oil and Gas Company, a corporation, hereinafter known and termed the grantee, its successors and assigns, and is hereby authorized to construct, acquire, operate and maintain a gas system and gas works, in the City of Pawhuska, Oklahoma, and to sell and supply said city and inhabitants and concerns thereof, and to lay, use and maintain pipes and mains, with all necessary and proper attachments, connections and appurtenances, below the surface of the streets, alleys, sidewalks, lanes and public grounds, and on the bridges of said city, as the boundaries now are, or may hereafter be extended by additions to the present limits or boundries thereof, for the supply and distribution of natural gas for illuminating, heating, manufacturing and motive power purposes, and excavate therefor, and for the same purposes to erect and maintain necessary posts for lamps, and for same purposes to make connections for consumers with such pipes and mains, for a term of twenty-five years from and after the passage, publication and ratification as required by law, of this ordinance;

"Provided: That all pipes hereafter laid shall be laid not less than eighteen inches below the surface.

"Provided, further: That all pavements, sidewalks, and excavations damaged by grantee shall be repaired and replaced with like material, and left in as good condition as before; and, should said grantee fail or refuse to replace and restore said pavement, sidewalks, or excavations, within a reasonable length of

time, then the same may be replaced by the said City, at the expense and cost of said grantee.

"Section 2. That under the permission and authority hereby granted, said grantee shall furnish natural gas to said City and inhabitants thereof at a reasonable rate, which shall in no case exceed the following rates for the following purposes to-wit:

For street lamps per month each, from sundown to sunrise, free. In case of inability for any reason of the City to furnish gas for public utilities or city buildings the grantee will furnish gas free.

"Section 3. Under the permission and authority hereby granted, the said grantee shall furnish natural gas to the citizens, at a reasonable rate, which shall in no case exceed fifteen cents per one thousand cubic feet of gas, as registered by standard meters for the measurement of natural gas, said meters to be furnished by and be the property of grantee, or at a flat rate at the option of consumer, which said flat rate shall in no case exceed the following prices to-wit:

Residence and Office Rates.

Cook stove or range, per month, $1.00; Heating stove, per month, for first heating stove, $1.00. All additional heaters, per month, $1.00, except small bed room heaters, which shall be 50 cents each, per month. Open gas grates $1.00. Incandescent lights, for ordinary use, per month, 10 cents each light.

Public Buildings, Hotels, Stores, etc.

Hotel and Restaurant gas ranges $1.75 per month; small stoves $1.00 per month; Medium sized stoves $1.50 per month; Large sized stoves $2.00 per month; Incandescent lights for ordinary use, per month 10 cents, and for all night use, 15 cents per month; Churches, Public and denominational schools free.

(Sections 4, 5 and 6 omitted).

'Section 7. All prohibitions, forfeitures and other provisions of this ordinance and franchise shall be binding upon the said grantee, its successors and assigns, whether expressly so stated herein or not; and all grants and privileges secured by this ordinance and franchise shall be held to inure to the benefit of said grantee, its legal and bona fide successors and assigns.

"Section 9. Nothing herein shall be construed to require said grantee, its successors or assigns to furnish gas as above if the supply of natural gas shall become exhausted or insufficient to supply the demand or if the expense of obtaining and furnishing the same should become so great that the grantee cannot furnish gas at the above prices without loss. In the event the grantee does not furnish gas at not to exceed the above prices then all their rights under this franchise shall cease.

(Sections 8, 10, and 11, omitted.)

"Section 12. This ordinance shall be in full force and effect from and after its passage publication and approval as provided by law, and filing of said written acceptance in the office of the City Clerk of said City by said grantee, and shall remain in full force and effect for a term of twenty-five years." (Printed Record pages 8 to 11, inclusive).

Hearing.

A hearing was had before the Corporation Commission, and on April 14th., 1917, the Commission made its' "Findings of Fact, Opinion and Order." (Printed Record, pages 16 to 27.)

The material parts required by this Writ of Error we deem to be as follows:

Facts.

"The evidence shows that the Pawhuska Oil & Gas Company is the owner of the gas mining lease adjacent to the City of Pawhuska; that since the year 1904, it has been supplying natural gas to the City of Pawhuska and the inhabitants thereof; **that since the year 1909 it has been furnishing gas under a franchise voted by the City of Pawhuska;** that prior to March, 1916, the company paid to the Osage Tribe of Indians only a nominal sum for the gas produced on its lease; that on said date its lease having expired it made a new lease and was compelled to pay thereafter at the well three cents per thousand cubic feet for all gas sold for domestic consumption and two cents per thousand cubic feet for all gas sold for industrial consumption; that the regulations of the Secretary of the Interior, under which the company's lease is made, provide, among other things, that all gas furnished to industrial and domestic consumers shall be metered and sold at meter rates.

"The evidence further shows that the franchise or charter which the company has with the City of Paw-

huska provides that the consumer may have the option of purchasing gas at either meter or flat rates; that at time of the hearing there were 807 domestic consumers, 5 industrial consumers and 3 commercial consumers, and that only 90 of all the consumers had meters installed or were receiving gas through meters or paying for the same at meter rates.

Present and Proposed Rates.

"The rates charged for gas at the present time are as follows: Domestic consumers, per month, $1.00 per stove and 10 cents per light; for gas sold through meters not to exceed 15 cents per thousand cubic feet.

"Industrial consumers: Brick company, 5 cents; Ice company 5 cents; laundry 8 cents; bottling works 10 cents and mill and elevator 10 cents per thousand cubic feet.

"Hotels, restaurants and public buildings flat rate, stoves and ranges $1.00 to $2.00 per month; lights 10 cents to 15 cents per month.

"Public schools, churches, street lights, city power plant, free.

"The Company ask the Commission to fix a rate of 25 cents per thousand cubic feet with a discount of 10 per cent, for prompt payment and a minimum rate of 50 cents per month for domestic consumers, and **a maximum rate of 10 cents per thousand cubic feet with a minimum rate of 10 cents per thousand cubic feet for public schools and public utilities owned by the City of Pawhuska.** House Bill No. 94 enacted by the recent legislature prohibits gas companies from making a minimum charge or collecting meter rents." (Printed Record, pages 16, 17).

Right to Change Rates Fixed by Franchise.

"Therefore, the Commission holds that it has authority to prescribe a schedule of rates for the City of Pawhuska regardless of any franchise or contract existing between the City of Pawhuska and the Gas Company." (Printed Record, page 18).

Installation of Meters.

"The Commission can also order the installation of meters if the facts justify." (Printed Record, page 18).

Discrimination.

"The present schedule of rates in the city of Pawhuska is discriminatory in that lower rates are made to some industries than to others and in that gas is furnished free to certain institutions in the city of Pawhuska." (Printed Record, Page 25).

"In the opinion of this Commission it is a mistake to allow a reduced rate to public institutions, as a general proposition. Somebody must eventually pay for the commodity furnished and for the service rendered. When gas is furnished to public institutions free, instead of being paid for by the city (,) property owners escape taxation in the amount which would be paid for gas if charged for as to other consumers; but the

deductions from the returns of the gas company must be made up in gas rates paid by other consumers. This added burden will fall most heavily on the small consumer.

"As has been stated, gas is being furnished free to the city, public schools and churches (R., p. 9) under the terms of the franchise. **This provision for free gas was undoubtedly one of the inducements held out to the city for granting the franchise.** While free gas for the city and these institutions is discriminatory as to other consumers, the Commission will not interfere with the arrangement. The city has its own gas well and the amount which the gas company will be compelled to furnish may not be great. All gas for such purposes must be metered and a monthly record kept showing meter readings for each installation and each class of service. **The Commission does not recognize the provision of the franchise in reference to free gas as binding on it or as controlling in reference to its orders, and if it is found from the records kept that the furnishing of free gas is inequitable or conducive of waste the arrangement will be discontinued."** (Printed Record, page 25).

ORDER.

"The Commission having reviewed the evidence herein, having made its findings of fact, and being fully advised in the premises, it is therefore ordered that natural gas rates in the City of Pawhuska shall be as follows:

"First 50,000 cu. ft. used by any consumer during any one month, 25 cents per M. cu. ft., with a discount of 5 cents per M. cu. ft. if paid within ten days after bill is rendered.

"Next 50,000 cu. ft. used by any consumer during any one month, 20 cents per M. cu. ft. with a discount of 3 cents per M. cu. ft. if paid within ten days after bill is rendered.

"Next 100,000 cu. ft. used by any consumer during any one month, 16 cents per M. cu. ft. with a discount of 2 cents per M. cu. ft. if paid within ten days after bill is rendered.

"Next 300,000 cu. ft. 13 cents per M. cu. ft. with a discount of 2 cents per M. cu. ft. if paid within ten days after bill is rendered.

"All over 500,000 cu. ft. 10 cents per M. cu. ft. net.

"Provided, that this schedule of rates shall not apply to gas heretofore furnished free to public schools, churches, and the City of Pawhuska.

"It is further ordered that all gas furnished or consumed shall be through meter and that the company shall install standard meters for all consumers in the City of Pawhuska.

"It is further ordered that the Pawhuska Oil & Gas Company shall **install meters for measuring the amount of gas furnished free to schools, churches, and the City and that a seperate meter be installed for each church, school building or class of service furnished free, and that a monthly record shall be kept showing meter readings for each installation and for each class of service, and that a copy of such record shall be furnished each month to the Corporation Commission.**

"The company shall have the right to require a deposit from all consumers equal to the estimated consumption for forty-five days and to cut off the service from any consumer who fails to pay his bill within fifteen days from the rendition thereof.

"The rates prescribed herein shall apply on all bills rendered for the month of April, 1917, and for all gas consumed during said month, and this order shall be in full force and effect in all respects and as to all of its provisions on and after April 24, 1917.

"Done at Oklahoma City, this 14th day of April, 1917." (Printed Record, pages 26, 27).

Appeal.

The City of Pawhuska appealed from the order of the Corporation Commission to the Supreme Court of the State, and among errors urged was that:

> "4. The Commission erred and violated section 10 of Article 1 of the Constitution of the United States in impairing the obligation of the contract of the City of Pawhuska with the Pawhuska Oil & Gas Company." (Printed Record, pages 27, 28).

Thereafter, and on the 31st. day of July, 1917, the Supreme Court of Oklahoma affirmed the judgement and order of the Corporation Commission (Printed Record, page 28), holding that the Utilities Act of 1913 (Chapter 93, pages 150, 151, Session Laws of 1913), conferring jurisdiction on the Corporation Commission, and the act of the Commission in voiding the contract between the City of Pawhuska and the Pawhuska Oil & Gas Company, did not impair the obligation of said contract, and did not violate Section 10 of Article 1 of the Constitution of the United States. (Printed Record, page 29).

The Chief Justice of the Supreme Court of Oklahoma allowed this Writ of Error, upon the application of the City of Pawhuska, and the Writ and a transcript of the record was filed in this Court on the 24th day of September, 1917. (Printed Record, page 43).

ASSIGNMENT OF ERRORS.

"The Supreme Court of Oklahoma erred in holding and deciding that Chapter 93, pp. 150, 151, of the Session Laws of Oklahoma for 1913, were valid as against the City of Pawhuska. The validity of said Chapter of said session laws was denied and drawn in question by the City of Pawhuska on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

"The said errors are more particularly set forth as follows:

"The Supreme Court of Oklahoma erred in holding and deciding,

"First. That said Chapter 93 of the Session Laws of 1913, conferring jurisdiction on the Corporation Commission, did not impair the obligation of the contract between the City of Pawhuska and the Pawhuska Oil & Gas Company, contrary to the provisions of the Federal Constitution; Article 1, Section 10.

"Second. That the decision and holding of the Corporation Commission raising and changing rates and the terms provided for in the contract of the Pawhuska Oil & Gas Company with the City of Pawhuska did not impair the obligation of said contract, contrary to the provisions of the Federal Constitution, Article 1, Section 10."

ISSUES.

The errors complained of resolve themselves into one issue: Did the Legislature of Oklahoma have authority in 1913, to create an agent, and authorize it to impair the obligations of a contract entered into in 1909, the contracting parties being the City of Pawhuska, and the Pawhuska Oil & Gas Company?

BRIEF OF THE ARGUMENT.

I.

Where the violation of the contract clause of the Federal Constitution is at issue, this Court will protect such clause by using its own independent judgment, and will not be bound by the opinion of the State Court. Detroit United Railway v. Michigan, 242 U. S., 249.

II.

The Franchise granted to, and accepted by, the Gas Company herein, is a contract between the City of Pawhuska and the Pawhuska Oil & Gas Company. Printed Record, pages, 9, 10, 11; Enid City Ry. Co. v. City of Enid, 43 Oklahoma, 779; Sapulpa v. Sapulpa Gas Co., 22 Oklahoma, 348; Oklahoma City v. Street Ry. Co., 20 Oklahoma, 1; City of Chicago v. Sheldon, 9 Wall. 50.

III.

The City of Pawhuska is entitled to the protection of Section 10, Article 1 of the Constitution of the United States, because

A.

The charter of the City was created by the people of the city, following the terms of the State Constitution, and can be altered, amended, or repealed only by a vote of the residents thereof, and in no event by the State Legislature. Dartmouth College, 4 Wheaton,

518; City of New Orleans v. New Orleans Water Works Co., 142 U. S., 79; Town of East Hartford v. The Hartford Bridge Co., 10 Howard, 536; Article 18, Sections 1, 2, 3, of Oklahoma Constitution; People v. Hoge, 55 California, 618; Cooley's Constitutional Limitations (seventh ed.), 114; State v. Scales, 21 Oklahoma, 683.

B.

The City of Pawhuska receives its legislative authority to enact franchise legislation from the State Constitution, and not from the State Legislature.

C.

This Court will take judicial notice of the fact that the City of Pawhuska is organized as a City under the provisions of Sections 3a and 3b of Article 18. of the Oklahoma Constitution. Griffing v. Gibb, 2 Black, 519; Gerling v. Baltimore & O. R. Co., 151 U. S., 673; Hanley v. Donohue, 116 U. S. 1; Renaud v. Abbott, 116 U. S. 277; Bienville Water Suply Co. v. Mobile, 186 U. S. 212.

IV.

The authority conferred upon the Corporation Commission by the Utilities Act (Chapter 93, pages 150, 151, of the Session Laws of Oklahoma, 1913), and the order of the Corporation Commission changing the terms of the contract herein, is void. as to the City of Pawhuska, because

A.

Authority to enact the franchise ordinance in question, and to regulate charges for the sale of gas thereunder, was vested in the City of Pawhuska by the State Constitution. Article 18, Sections 1, 2, 5, 7, of the Oklahoma Constitution; Mayor and Councilmen of Pawhuska v. Pawhuska Oil & Gas Co., 28 Oklahoma, 563; Section 1 of Article 5, Oklahoma Constitution; Article 5, Section 51 of Constitution; M'Culloch v. Maryland, 4 Wheat. 316, Marshall's Constitutional Opinions, 282; Gibbons v. Ogden, 9 Wheat. 1, Marshall's Opinions, 433, 454; Barron v. Baltimore, 7 Peters', 243, Marshall's Opinions, 728; Brown v. Maryland, 12 Wheat. on page 438, Marshall's Opinions, on page 529; Cooley's Constitutional Limitations (seventh ed.), 65, 92, 99; Article 9, Sec. 18, of Oklahoma Constitution.

B.

The Legislature is without authority to grant the franchise herein, **and to fix the charges which the Gas Company may receive for its gas under its franchise.** Cooley's Constitutional Limitations, pages 62, 63 and 124.

V.

The order of the Corporation Commission, sustained by the Supreme Court of the State, under authority of Chapter 93, pages 150, 151, of the Session Laws of 1913, impaired the obligation of the contract entered into between the City of Pawhuska and the Pawhuska Oil & Gas Company in 1909, because

A.

The Legislature authorized the Commission to do that which the Legislature was without authority to do directly or by agent, to-wit, regulate the charges which the Gas Company should receive for its gas sold in Pawhuska under its franchise.

B.

The Corporation Commission under authority of the 1913 act, raised the rates and charges which the consumers in the City of Pawhuska are compelled to pay to the Gas Company for gas. Printed Record, 17, 26, 27.

C.

The order of the Corporation Commission, under authority of the Act of 1913, and sustained by the Supreme Court of the State, takes from the City of Pawhuska a part of the consideration it was agreed by the Pawhuska Oil & Gas Company should be paid to the City for the franchise. Printed Record, pages 9, 10, 17, and 25; Dartmouth College Case, 4 Wheat. on pages 694, 695; Greenwood v. Freight Co., 105 U. S., 20.

STATE LAWS.

Session Laws of 1913, Chapter 93, pages 150, 151.

"Section 1. The term "public utility", as used in this act, shall be taken to mean and include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public.

(a) for the conveyance of gas by pipe line.

(b) For the production, transmission, delivery, or furnishing of heat or light with gas.

(c) For the production, transmission, delivery, or furnishing electric current for light, heat or power.

(d) For the transportation, delivery or furnrishing of water for domestic purposes or for power.

The term "Commission" shall be taken to mean Corporation Commission of Oklahoma.

Section 2. The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is con-

ducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general condition, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controllel or operated, the value of the same, the management, conduct, operation, practises and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission."

(Sections 3, 4, 5 and 6, not material).

ARTICLE 18 OF CONSTITUTION.

'Section 1. Municipal corporations shall not be created by special laws, but the Legislature, by general laws shall provide for the incorporation and organization of cities and towns and the classification of same in proportion to population, **subject to the provisions of this article.**

"Section 2. Every municipal corporation now existing within this State shall continue with all of its present rights and powers until otherwise provided by law, **and shall always have the additional rights and powers conferred by this constitution.**

Sec. 3a Any city containing a population of more than two thousand inhabitants **may frame a charter for its own government,** consistent with and subject to the Constitution and laws of this State, by causing

a board of freeholders, composed of two from each ward, who shall be qualified electors of said city, to be elected by the qualified electors of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board or a majority of them, and returned, one copy of said charter to the chief executive officer of such city, and the other to the Register of Deeds of the county in which said city shall be situated. Such proposed charter shall then be published in one or more newspapers published and of general circulation within said city, for at least twenty-one days, if in a daily paper, or in three consecutive issues, if in a weekly paper, and the first publication shall be made within twenty days, after the completion of the charter; and within thirty days, and not earlier than twenty days after such publication, it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified electors voting thereon shall ratify the same, it shall thereafter be submitted to the Governor for his approval, and the Governor shall approve same if it shall not be in conflict with the constitution and laws of this State. Upon such approval it shall become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it. A copy of such charter, certified by the chief executive officer, and authenticated by the seal of such city, setting forth the submission of such charter to the electors and its

ratification by them shall, after the approval of such charter by the Governor, be made in duplicate and deposited, one in the office of the Secretary of State, and the other, after being recorded in the office of the Register of Deeds, shall be deposited in the archives of the city; and thereafter all courts shall take judicial notice of said charter. **The charter so ratified may be amended by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof (or by petition as hereinafter provided) at a general or special election, and ratified by a majority of the qualified electors voting thereon, and approved by the Governor as herein provided for the approval of the charter.**

(Section 4, then provides for the Initiative and Referendum in Municipalities).

Franchises.

"Section 5a. No municipal corporation shall ever grant, extend or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election ,or call a special election for such purpose at any time upon thirty day's notice; **and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years.**

"Section 5b. Whenever a petition signed by a number of qualified electors of any municipal corporation

equal to twenty-five per centum of the total number of votes cast at the next preceding general municipal election, demanding that a franchise be granted, extended, or renewed, shall be filed with the chief executive officer of said corporation, the chief executive officer shall, within ten days thereafter, call a special election at which he shall submit the question of whether or not such franchise shall be granted, extended, or renewed, and if, at said election, a majority of the said electors voting thereon shall vote for the grant, extension, or renewal of such franchise, the same shall be granted by the proper authorities at the next regular meeting of the legislative body of the city.

"Section 6. Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said corporation.

"Section 7. No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment.

Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted." Williams' Constitution, pages 204 to 212, inclusive.)

ARGUMENT.

I.

Where the violation of the contract clause of the Federal Constitution is at issue this Court will protect such contract clause by using its own independent judgment, and will not be bound by the opinion of the State Court.

In the recent case of Detroit United Railway v. Michigan, 242 U. S., 249, 61 Law ed. 274, this Court said:

> "But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligaton of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been imparied by subsequent legislation?"

II.

The Franchise granted and accepted by the Gas Company herein, is a contract between the City of Pawhuska and the Pawhuska Oil & Gas Company.

The franchise granted to the Gas Company the valuable right to use the streets, alleys, and public grounds within the City of Pawhuska, and granted the same use in any additions to the city, and for a term of twenty-five years. Without this right the Gas Company could not convey its product to its consumers.

In return therefor and as a consideration to the city for use of the streets, alleys and public grounds, the Gas Company bound itself by the franchise to, (1) furnish gas to the citizens of Pawhuska at rates not to exceed those stipulated in the franchise. (2) That the consumer could purchase gas either at the meter rate or at the "flat" rate. (3) "In case of inability for any reason of the City to furnish gas for public utilities or city buildings the **grantee** will furnish gas free", and (4) Churches, Public and denominational schools **free".**

> "Section 7. All prohibitions, forfeitures and **other provisions** of this ordinance and franchise shall be binding upon said grantee, its successors and assigns, whether expressly so stated herein or not; and all **grants** and **privileges** secured by this ordinance and franchise shall be held to inure to the benefit of said grantee, its legal and bona fide successors and assigns." (Printed Record, pages 9 and 10).

The Supreme Court of Oklahoma in November, 1914, in considering the terms of a franchise granted to a street railway company, held, "that said franchise when accepted, constituted a valid contract between the city of Enid and defendant, the impairment of which by the state or the city of Enid is prohibited by section 10, article 1, of the Constitution of the United States." Enid City Ry. Co., v. City of Enid, 43 Oklahoma, 779; also, Sapulpa v. Sapulpa Gas Co., 22 Oklahoma, 348; Oklahoma City v. Oklahoma Street Ry. Co., 20 Oklahoma, 1; City of Chicago v. Sheldon, 9 Wall. 50.

III.

The City of Pawhuska is entitled to the protection of Section 10, Article 1 of the Constitution of the United States, because

A.

The charter of the City was created by the people of the city, following the terms of the State Constitution, and can be altered, amended, or repealed only by a vote of the residents thereof, and in no event by the state legislature.

This Court very early (Dartmouth College case) held that the charter of a municipal corporation was not protected against impairment by the contract clause of the Federal Constitution, for the reason that the corporation was governmental, was created by the legislature of the state, and could be destroyed by the legislature at its will. In the City of New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 Law ed. 946, this court used this language:

> "The city being a municipal corporation and the creature of the State Legislature, does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed, or even abolished at the will of the Legislature." Citing the Dartmouth College case.

We understand the rule adopted by this court to be, that a municipal corporation will not be heard to complain because the Legislature regulates the charges to be made by a public service corporation, acting un-

der a franchise from the municipality, because the Legislature having authority to amend or repeal the municipal charter, can do the minor act of regulating rates within the municipality.

In the Town of East Hartford v. The Hartford Brdge Co., 10 Howard, 536, 13 Law ed. 529, Mr. Justice Woodbury quotes the following from Justice Story, in the Dartmouth College case:

> "It may also be admitted, that corporations for mere public government, such as towns, cities, and counties, may, in many respects, be subject to legislative control."

Then Justice Woodbury says:

> "When they are wished to be in some respects not so subject, but to act exclusively, it should be so expressed in the constitutions of their states."

The State of Oklahoma seems to have done just the very thing that was suggested by this court supra, should be done. Section 1, of Article 18, of the Oklahoma Constitution provides, that

> "Section 1. Municipal corporations shall not be created by special laws, but the Legislature, by general laws shall provide for the incorporation and orgainzation of cities and towns and the classification of same in proportion to population, subject to the provisions of this article."

> "Sec. 2 Every municipal corporation now existing within this State shall continue with all of its present rights and powers until otherwise provided by law, and shall always have the additional rights and powers conferred by this Constitution."

The remainder of the article on Municipal Corporations is devoted to conferring those "additional rights and powers", mentioned in section 2. The City of Pawhuska holds its charter under the following sections of Article 18 of the Constitution of Oklahoma.

> "Sec. 3a. Any city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of freeholders, composed of two from each ward, who shall be qualified electors of said city, to be elected by the qualified electors of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board or a majority of them, and returned, one copy of said charter to the chief executive officer of such city, and the other to the Register of Deeds of the county in which said city shall be situated. Such proposed charter shall then be published in one or more newspapers published and of general circulation within said city, for at least twenty-one days, if in a daily paper, or in three consecutative issues, if in a weekly paper, and the first publication shall be made within twenty days after the completion of the charter; and within thirty days, and not earlier than twenty days after such publication, it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified electors voting thereon shall ratify the same, it shall there-

after be submitted to the Governor for his approval, and the Governor shall approve the same if it shall not be in conflict with the Constitution and laws of this State. Upon such approval it shall become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it. A copy of such charter, certified by the chief executive officer, and authenticated by the seal of such city, setting forth the submission of such charter to the electors and its ratification by them shall, after the approval of such charter by the Governor, be made in duplicate and deposited, one in the office of the Secretary of State, and the other, after being recored in the office of said Register of Deeds, shall be deposited in the archives of the city; and there after all courts shall take judicial notice of said charter. The charter so ratified **may be amended by proposals therefor, submitted by the Legislative authority of the city to the qualified electors thereof** (or by petition as hereinafter provided) at a general or special election, and ratified by a majority of the qualified electors voting thereon, and approved by the Governor as herein provided for the approval of the charter." (Williams Annotated Constitution.)

Section 4a of Article 18, then reserves to every municipal corporation the powers of the Initiative and Referendum, and Section 4e provides for the submission of an initiated charter amendment to the qualified electors for their approval.

Section 3a, supra, sets forth the mode and manner in which the charter, once adopted, may be amended,

to-wit, by a majority of the qualified electors voting thereon at a general or special election, the amendment to be thereafter approved by the Governor. The Governor can reject, or refuse to approve, the amendment, but the same can never reach the Governor until after ratified and adopted by the qualified electors of the city. The procedure for amendment of the charter set forth in section 3a, supra, is the **sole** and **exclusive** method of amendment. This section 3a was, with a few changes, taken from the California Constitution, and the Supreme Court of California, in People v. Hoge 55 California, 618, says:

> "It was manifestly the intention of sections 8, 13 and 14, art. XI, as well as of sec. 25, art. IV of the Constitution, to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature, and this is the more apparent in view of the fact that the charter framed by the Board of Freeholders, and ratified by the vote of the people, **cannot be amend ed by the Legislature.**"

> "Section 3 of article 18 (subdivision "a" and "b") of the Constitution (Bunn's Ed. sec. 413 and 414), is self-executing, and susceptible of execution without additional legislation to put same into force." State v. Scales, Mayor, 21 Oklahoma 683.

> "Where a power is expressly given by the Constitution and the mode of its exercise is prescribed, such mode is exclusive." 105 Texas, 194.

Judge Cooley in his work on Constitutional Limitations (seventh ed.), page 114, says:

> "If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the **people** designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication."

As above suggested, this section 3a was, with a few changes, taken from the Constitution of California but the people of Oklahoma desiring that the Legislature be entirely eliminated, provided that the charter after its adoption be submitted to the Governor of the State, rather than to the Legislature, as provided for in the California Constitution.

B.

The City of Pawhuska receives its legislative authority to enact franchise legislation from the State Constitution, and not from the State Legislature.

This authority is contained in Sections 5a, and 5b of Article 18 of the Constitution, and as same must of necessity be discussed under the next subject, we omit same at this point.

IV.

The authority conferred upon the Corporation Commission by the Utilities Act (Chapter 93, pages 150, 151, of the Session Laws of Oklahoma, 1913), and the order of the Corporation Commission changing the terms of the contract involved herein, is void, as to the City of Pawhuska, because

A.

Authority to enact the franchise ordinance in question, and to regulate charges for the sale of gas thereunder, was vested in the City of Pawhuska by the State Constitution.

Article 18 of the Oklahoma Constitution has to do with Municipal Corporations, and section 2 thereof reads in part, "and shall always have the additional rights and powers conferred by this Constitution." Section 3a confers the right of a "Freeholders form of Charter", and then the additional right of legislating franchises is conferred.

"Sec. 5a No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty day's notice; **and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years.**"

"Sec. 5b Whenever a petition signed by a number of qualified electors of any municipal corporation equal to twenty-five per centum of the total number of votes cast at the next preceeding general municipal election, demanding that a franchise be granted, extended, or renewed, shall be filed with the chief executive officer of said corporation, the chief executive officer shall, within ten days there after, call a special election, at which he shall submit the question of whether or not such franchise shall be granted, extended, or renewed, and if, at said election, a majority of the said electors voting thereon shall vote for the grant, extension, or renewal of such franchise, the same shall be granted by the proper authorities at the next succeeding regular meeting of the legislative body of the city."

"Sec. 7. No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any munici-

pality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment.

"Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted." (Williams Annotated Constitution of Oklahoma.)

It was under the above provisions of the Constitution that the qualified electors within the City of Pawhuska voted to grant the franchise to the Pawhuska Oil & Gas Co. The Mayor and Councilmen refused to issue the franchise, in accordance with the expressed vote of the people, and by a writ of mandamus were compelled to perform that duty, the Supreme Court holding that the sections, supra, of the Constitution were self-executing and mandatory. Mayor and Councilmen of the City of Pawhuska v. Pawhuska Oil & Gas Company, 28 Oklahoma, 563, 115 Pacific Reporter 353.

Political authority in Oklahoma has been distributed differently than in the other states. When Oklahoma was admitted into the Union of states, the people delegated to the Federal Government all authority called for by the Constitution of the United States, reserving the remainder of their political authority to be distributed as they thought proper, limited, of course, by the requirement that the government organized must be republican in form, and not conflict with the Federal Constitution. In vesting the remaining legislative authority, the people by their organic law, choose to limit the General Legislative branch of the State by delegating, for special purposes, legislative authority

to the several municipal corporations within the state. The legislative authority delegated to the municipalities is limited in its scope, but as to the subjects over which they have legislative control, their authority is, and must be, as full and complete, and entitled to as much deference, as the State Legislature. Section 1, of Article 5, creating the State Legislature, is further evidence of the fact that the people of Oklahoma did not intend to vest all legislative authority in the State Legislature.

> "Section 1. The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature."

A limitation was placed upon the Legislature of the State in the first section of the article on Municipal Corporations.

> "Section 1. Municipal corporations shall not be created by special laws, but the Legislature, by general laws shall provide for the incorporation and organization of cities and towns and the classification of same in proportion to population, **subject to the provisions of this article.**"

Sections 5a, 5b, and 7, of Article 18, supra, place three limitations against the municipality in granting franchises. (1). No franchise shall be granted, extended, or renewed for a longer term than twenty-five

years. (2). No exclusive franchise shall ever be granted, and (3), nor shall the power to regulate the charges for public services be surrendered. It is the third limitation of authority that raises the principal issue in this case. The city being the legislative body that grants the franchise, it probably will not be questioned that the limitation against granting franchises for a longer term than twenty-five years, and against granting an exclusive franchise, were directed to the city, as the State Legislature is in no way concerned therein. Certainly the limitation on granting exclusive franchises must have been directed to the municipal legislature, as in Article 5, creating the general legislative body of the state, is found a limitation against granting any exclusive rights by the State Legislature.

> "Sec. 51 The Legislature shall pass no law granting to any association, corporation, or individual, **any exclusive rights, privileges, or immunities within this State.**"

The limitation against "surrendering the power to regulate the charges for public services" would necessarily be directed to the legislative body that had authority to enact the law, which when accepted became a franchise, and how could a **"power"** be **"surrendered"** which was not in possession? There could be no more reason for directing this limitation to the State Legislature than to the Governor, as the Governor is just as much the active authority in granting municipal franchises as is the Legislature.

In Oklahoma the State reserves its right of control, jointly with the municipality, over the streets, alleys and public ways, within municipal corporations, and the people desiring that the State not surrender this right, specifically reserves same in the first paragraph of section 7:

> "No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment."

But the right of control in the State is a passive right, and in this instance where the State is to retain the right and benefit, the State is specifically mentioned. This is the only instance in the sections delegating authority to the municipality to enact franchises that the "State" is mentioned.

It is paradoxical under our form of government, and its distribution of powers, to say that one legislative body with the sole, full, and complete, authority to legislate on a subject, can have its enactments voided by another legislative body, whose authority has been limited by the terms of the charter creating it. Chief Justice Marshall, in M'Culloch v. State of Maryland, 4 Wheaton, 316, Marshall's Constitutional Opinion's (Dillon), on page 282, used language that seems to cover the present situation:

"From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, **1st, That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve. 3d. That, where the the repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."**

And again, in Gibbons v. Ogden, 9 Wheaton, 1 to 240, Marshall's Constitutional Opinions (Dillon) on page 454:

"The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, **and in the exercise of which its whole value consists."**

And again, in the same opinion (Marshall's Constitutional Opinions (Dillon), on page 433:

"It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,-- that which the words of the grant could not conprehend. If, then, there are in the Constitution plain exceptions from the power over navagation, plain inhibitions to the exercise of that power in a particular way, **it is proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted."**

And in Barron v. Baltimore, 7 Peters' Reports, 243, Marshall's Constitutional Opinions, on page 728:

> "The powers they conferred on this government were to be exercised by itself; **and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument."**

The franchise sections of the Constitution, supra, were, in the language of section 2 of article 18, "additional rights and powers" conferred on municipalities by the Constitution, and which they "shall always have," The right to legislate franchises was limited in "general terms", and, we think, "necessarily, applicable" to the legislative body authorized to grant franchises, created by the article on municipal corporations.

This Court in Brown v. Maryland, 12 Wheaton, on page 438, Constitutional Opinions, supra, on page 529, used this language:

> **"If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the law giver, the thing excepted would be within the general clause had the exception not been made, we know of no reason why this general rule should not be as applicable to the Constitution as to other instruments."**

Judge Cooley, in his work on Constitutional Limitations (seventh ed.), page 65, says:

> "Local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instru-

ment. And even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existance and anticipated continuance in view."

Again, on page 98, Judge Cooley says:

"Akin to this is the rule that 'where the power is granted in general terms, the power is to be construed as coextensive with the terms, unless some clear restriction upon it is deducible (expressly or by implication) from the context' ".

Page 99:

"Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to the other cases."

We respectfully submit that the power to legislate franchises given in sections 5a and 5b of article 18 is given in general terms, and that the municipality has full and complete authority in the premises, except as to the three limitations, and, that necessarily, the limitations run against the legislative body that has the right to act, and not to the General Legislature having no authority to legislate franchises.

Section 18 of Article 9, of the State Constitution, creating a Corporation Commission for certain purposes, we think, recognizes the fact that municipalities were in the article on Municipal Corporations to be given powers of rate regulation. The Corporation Commission was given jurisdiction over transportation and transmission Companies, and then in section 18, we find:

"The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies shall, subject to regulation by law, be **paramount**; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the **superior** authority of the Legislature to legislate thereon by general laws; **Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town, or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise."** Williams' Constitution of Oklahoma., 203.

Section 2 of the Schedule to the Constitution (Williams' Constitution, page 223), placed all laws then in force in Oklahoma Territory in force in the new state, unless the same were repugnant to the new Constitution, or were locally inapplicable. One of the sections in force at that time, as to cities of the first class, was 398, found on page 241 of volume 1, of Wilson's Statutes of 1903, which reads:

"The council may provide for, and regulate the lighting of the streets, the erection of lamp posts, and the council shall have the power to make contracts with, and authorize any person, company or association to erect gas or electric works in said city and give such person, company or association the privilege of furnishing gas, or electricity to light the streets, lanes and alleys of said city for any length of time, not exceeding twenty-one years. But no grant shall be so conditioned as to prevent the council from granting to other persons, or companies, or corporations, the right to use the streets for like purposes; and all such grants shall be subject at all times, to reasonable regulation by ordinance, as to the use of streets and prices to be paid for gas or light."

This section, which gave the city council the right by ordinance to regulate prices to be paid for gas, was in force at the time the Constitution was being drafted, and it is not presuming too much to say that, the members of the Convention used this section of the statute as a basis for working out the provisions of the franchise sections in article 18 of the Constitution; that the desire was to give the municipality the same rights of regulation by the Constitution, which the city had under the statute, but, to give same by the Constiutution, to the end that some future Legislature might not take the right away.

B.

The Legislature is without authority to grant the franchise herein, and to fix the charges which the Gas Company may receive for its gas under its franchise.

Sections 5a and 5b of Article 18, supra, conferred upon the municipality legislative rights, and in so doing withdrew such rights from the ordinary authority of the Legislature. The authority conferred **upon the municipalities is just as full and complete as the authority of the General Legislature would have been had sections 5a and 5b been omitted from the Constitution.** The authority conferred upon the municipality is legislative, and carries with it the necessary incidents to make it complete, as would have been in the Legislature, and it is for that reason that we find therein the limitations against granting exclusive franchises, etc., including the limitation against surrendering the power to regulate the charges for the sale of gas under the franchise. We refer the court to the several citations given under subdivision "A", preceeding this subdivision.

Cooley's Constitutional Limitations (seventh ed.), page 124, reads:

> "But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the the sovereignty of the country, so that it may

exercise all the powers of the government if it wills so to do; while on the other hand the legislatures of the American States **are not the sovereign authority,** and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in weilding it, hedged in on all sides by **important limitations,** some of which are imposed in express terms, **and others by implications which are equally imperative."**

Page 62, same volume:

"Subject to the foregoing principles and limitations, each State must judge for itself what provisions shall be inserted in its constitution; how the powers of government shall be apportioned in order to their proper exercise."

Same volume, page 63:

"How far the constitution of a State shall descend into particulars of government, is a question of policy addressed to the convention which forms it."

V.

The order of the Corporation Commission, sustained by the Supreme Court of the State, under authority of Chapter 93, pages 150, 151, of the Session Laws of 1913, impaired the obligation of the contract entered into between the City of Pawhuska and the Pawhuska Oil & Gas Company in 1909, because

A.

The Legislature authorized the Commission to do that which the Legislature was without authority to do directly or by its agent, to-wit, regulate the charges which the Gas Company should receive for its gas sold in Pawhuska under its franchise.

For the Act of 1913, see under "State Laws", supra.

Authorities, supra.

B.

The Corporation Commission under authority of the 1913 act, raised the rates and charges which the consumers in the City of Pawhuska are compelled to pay to the Gas Company for gas.

(Printed Record, pages 17, 26 and 27).

C.

The order of the Corporation Commission, under authority of the Act of 1913, and sustained by the Supreme Court of the State, takes from the City of Pawhuska a part of the consideration it was agreed by the Pawhuska Oil & Gas Company should be paid to the City for the franchise.

The contract between the City and the Gas Company required the Company to furnish gas free to the churches, schools, and under some circumstances to the City. (Printed Record, pages 9, 10, 17 and 25). The Commission found:

> "As has been stated, gas is being furnished free to the city, public schools and churches (R., p. 9) under the terms of the franchise. This provision for free gas was undoubtedly one of the

inducements held out to the city for granting the franchise. While free gas for the city and these institutions is discriminatory as to other consumers, the Commission will not **at this time** interfere with the arrangement. The city has its own gas well and the amount which the gas company will be compelled to furnish may not be great. All gas for such purposes must be metered and a monthly record kept showing meter readings for each installation and **each class** of service. **The Commission does not recognize the provision of the franchise in reference to free gas as binding on it or as controlling in reference to its orders, and if it is found that from the records kept that the furnishing of free gas is inequitable or conducive to waste the arrangement will be discontinued."** . (Printed Record, page 25).

Under the order of the Commission the franchise is entirely wiped off the slate, insofar as benefits to the city is concerned. The Gas Company has the use of the streets, alleys, and public grounds of the city, but every obligation they assumed in the contract has been cancelled and destroyed, by the order of the Commission, under authority of Act of 1913. Not only did the Gas Company obligate itself to furnish free gas to the city, but to the city as trustee for the schools and churches of the city. Justice Story, in the Dartmouth College case, said:

"For this purpose it matters not how trifling the consideration may be; a pepper corn is as good as a thousand dollars. **Nor is it necessary that the consideration should be a benefit to the grantor. It is sufficient if it import damage or loss, or forebearance of benefit, or any act done, or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer."** (4 Wheaton, on page 684).

We respectfully submit that, the right to receive the free gas, was a part of the consideration for granting the Gas Company the right to use the streets, and public grounds of the city; that the same is a vested private property right of the city, and is protected by the contract clause of the Federal Constitution. (Justice Story, Dartmouth College case, 4 Wheaton, on pages 694, 695, Greenwood v. Freight Co., 105 U. S., 20).

CONCLUSION.

In conclusion, we respectfully submit that, at the time the contract herein was entered into, the provisions of the Constitution of the State had not been construed by the State Supreme Court. It is true that the Constitutional provisions, involved herein, are, in some respects, a departure from the general manner of distributing powers, or governmental agencies, by the people. But, it is established law, and a familiar rule for the construction of constitutions, that the powers conferred by the people upon governmental agencies are not to be so construed as to interfere with the rights and powers conferred upon other governmental agencies. In Oklahoma the legislative authority of the Legislature is supreme, except as to the limitations placed thereon, and where the people in the Constitution vested authority in other governmental agencies; that the people by their Constitution have left all auhority with reference to state legislation with the State Legislature, but they have in the Constitution provided for a limited number of legislative bodies for a special purpose, to-wit, the people in each municipal corporation, as to franchises to be granted in the municipality in which they live; that, for the purposes for which they were created, each of the legislative bodies is supreme; the one cannot exercise powers conferred on the others, and, that, the acts of each, and all, are subject to the regulation and control of the courts, created by the people as an agency to compel each of these legislative bodies to limit their activities to the purposes for which they were created.

We respectfully submit that the judgement of the Supreme Court of Oklahoma, in holding that the Act of the Legislature of 1913 (Chapter 93, pages 150, 151) did not impair the obligation of the contract involved herein, should be by this Honorable Court reversed.

Respectfully submitted.

Preston A. Shinn.
For the City of Pawhuska.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

NO. 281.

The City of Pawhuska, Plaintiff in Error

vs.

Pawhuska Oil and Gas Company, and the State of Oklahoma,

Defendants in Error

In Error to the Supreme Court of the State of Oklahoma.

REPLY.

Preston A. Shinn,
For Plaintiff in Error.

Pawhuska Capital Print, Pawhuska Okla.

IN THE SUPREME COURT OF THE UNITED STATES.

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Defendants in Error

In Error to the Supreme Court of the State of Oklahoma.

REPLY.

The answer brief of the Pawhuska Oil & Gas Company, on pages 3 and 8, would take the position that the City of Pawhuska, Plaintiff in Error, was relying upon Section 593 of the Revised Laws of 1910, which

was Section 398 of Volume 1 of Wilson's Statutes of 1908, carried over by the Schedule to the Constitution.

Plaintiff in Error believes that its brief is plain as to this point, and that is, that the City is relying on the provisions of the State Constitution. The Schedule to the Constitution only placed in effect such laws of the Territory "which are not repugnant to this Constitution" (Schedule, Sec 2, 223 of Williams' Constitution). At the time the City and the Gas Company entered into the contract herein the City received its authority from the State Constitution and not from the acts of the Legislature, and the Supreme Court of this state, relative to this same franchise, held that the authority of the City grew out of the Constitution; that the sections of the Constitution pertaining thereto were self-executing.

Mayor of Pawhuska v. Pawhuska Oil & Gas Co., 28 Okla., 563.

Should this Court hold that the authority of the City to enter into the franchise herein was not conferred by the terms of the Constitution, but from Section 593 of the Revised Laws of 1910, then the City says that said section specifically gave the right to "contract" and by ordinance to fix rates, and that same is protected from Legislative acts by Section 18 of Article 9 of the Constitution, which section contains the following:

"The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic for transportation and transmission companies, shall, subject to regulation by law, **be paramount**; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be **subject** to the **superior** authority of the Legislature to legislate thereon by general laws; Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town, or county to prescribe rules, regulations, **or rates of charges** to be observed by any public service corporation in connection withh any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise".

The above excerpt from Section 18 is a limitation upon the authority of the Legislature. Therefore, if Section 398 of Wilson's Statutes was carried over, and became Section 593 of the Revised Laws of 1910, and was not repealed until the Act of 1913, conferring authority upon the Corporation Commission, a contract made in 1909 between the parties herein, would be protected by Section 18 of Article 9 of the State Constitution, and therefore, the authority having been given by the state to the city, same would be protected by the Contract Clause of the Federal Constitution.

ARTICLE IX, SECTION XVIII.

Counsel in Answer Brief say that Section 18 of Article 9 is subject to repeal by the Legislature, and therefore does not apply. We refer to Section 18 of Article 9, in our principal brief, but only for the purpose of throwing light upon the construction to be given Article 18 of the Constitution. To the end that the Court may see that other sections of the Constitution sustain our contention as to the meaning to be given Article 18, touching municipal corporations, and the authority conferred upon them by that Article. The printer in setting up the brief of the Gas Company left out the word "from" in Section 35 of Article 9, which word becomes very important in reaching a correct conclusion as to the authority of the Legislature to repeal Section 18. Section 35:

> "After the second Monday in January, nineteen hundred and nine, the Legislature may, by law, from time to time, alter, amend, revise, or repeal sections **from** eighteen to thirty-four, inclusive, of this article, or any of them, or any amendments thereof: **Provided, That no amendment made under authority of this section shall contravene the the provisions of any other part of this Constitution other than the said sections last above referred to or any such amendments thereof."**
>
> (Williams' Constitution, page 120, 121.)

Not knowing what view the Court will take of the materiality of Section 18, supra, we will discuss the right of the Legislature to repeal same. The Act of

1913 did not pretend in any manner to change or repeal Section 18, and in other instances in which the Legislature had the right to change the Constitution, and exercised the right, the Act of the Legislature has shown on its face that the intention of the Legislature was to amend the Constitution, as authorized by the Constitution. If it had been the intention of the Legislature to repeal this section of the organic law, cerainly attention would have been called to the fact, to the end that the people might know that the organic law had been changed.

The court will notice that the section reads, "sections **from** eighteen to thirty-four, inclusive." This section, as well as Section 18, was taken from the Virginia Constitution of 1902 (Note to Williams' Constitution, pages 103, 121,). Section 35 of Article 9 was changed in its reading from the Virginia section by inserting the word **"from"** before the word "eighteen". It has been well established by the courts of this country and of England that "from" is used as a word of exclusion, unless in reading the context of the instrument the court should find that it was the intention to use same as a word of inclusion. The case of Pugh v. Leeds, 2 Cowp. (Eng.) 714, opinion by Lord Mansfield, seems to be the leading case, and the principle therein stated has been re-stated and followed by the courts of this country, including the State of Oklahoma.

See Budds v. Frey, 104 Minn. 481, American & English Anno. Cases, Vol. 15, page 24, and an exhaustive note thereto, citing cases from most of the states, as well as the Federal Courts.

In Rex v. Gamlingay, 3 T. R. (Eng.) 513, the Court said:

"The case of Pugh v. Leeds, 2 Cowp. 714, was properly decided; but that turned on the construction of a contract between two persons, where their intention was to be considered. But greater certainity is required in indictments than in contracts of that kind. Now the whole of the road described by the former part of the indictment is excluded by the terms 'from' and 'unto' ".

"The word 'from', in its literal and restricted sense, generally means exclusive, but it may be used in a connection that means inclusive. In construing it, therefore, courts will take into consideration the context and subject matter, and construe it to mean either inclusive or exclusive, according at it is influenced by its connection."

Baker v. Hammett, 23 Okla. 480, 100 Pac. Rep. 1114.

Lewis' Sutherland Statutory Construction (Second Ed.) Vol. 1, page 330, says: " 'From' is a term of exclusion, * * * *."

The general rule is that Constitutions can only be amended by the people, and not by the Legislature. This is the rule in all the states, including Oklahoma. It is only a few provisions of the Constitution that the Legislature is authorized to repeal. If, as was said in Rex v. Gamlingay, supra, indictments must be strictly construed, how much stronger does the same rule apply to those who contend that a provision of the Constitution can be repealed? The authority of the Legislature must be plainty set forth in the Constitution before it would have that right.

We invite the Court to a study of the context of Article 9, of the Constitution, as well as to a study of the history of the times. Section 15 of this Article creates the Corporation Commission, Section 16 prescribes the qualifications of its members, and Section 17 prescribes the form of oath to be taken by the Commissioners. Section 18 confers jurisdiction on the Commission, and says therein, that: "The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be **paramount**; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the **superior** anthority of the Legislature to legislate thereon by general laws". Of course the Corporation Commission cannot be "paramount" as to transportation and transmission companies, and yet subject to having its authority

wiped out by the Legislature. If Section 18 is subject to repeal by the Legislature, then we have a Corporation Commission, well qualified, and under oath to perform the duties of the office, but with out any jurisdiction whatsoever. In view of the fact that Commissions of this kind have been provided for in a large majority of the states, as well as the Interstate Commerce Commission of the Federal Government, can this Court say that the people of Oklahoma intended such a foolish thing as to allow some future legislature to fritter away the rights of the people by depriving the Commission of its jurisdiction? That the people were only interested in creating positions to be filled by high salaried officials, without jurisdicton to serve the public?

Sections 18 and 35, supra, were taken from the Virginia Constitution, but our Convention added the word "from" in Section 35, and we think clearly intending that Section 18 was not to be repealed by the Legislature. The word "inclusive" after the words "thirty-four" was for the purpose of making sure that Section Thirty-four could be repealed by the Legislature. Having used the word "inclusive" in the section, the Convention would have said "both inclusive" and omitted the word 'from', had it intended that Section 18 was to be repealed at the will of the Legislature. Or Sections 18 to 34, inclusive.

OKLAHOMA CASES.

Defendant in error cite Pionerr Tel. Co., v. State, 33 Okla., 724 and S. McAlester v. Eufaula Tel. Co., 25 Okla., 524, as being authority to sustain the position of the Legislature, and its authority to confer jurisdiction on the Corporation Commission by the Act of 1913. In the Pioneer case, supra, the franchise was granted in Oklahoma City in 1906, prior to Statehood, by a City of the First Class, but under laws applicable to "cities, towns, and villages", and under a section that only attempted to give the right to the municipality to "authorize the construction and maintenance of telephone wires along or through the streets and alleys" and to "grant franchises and rights to corporations for such purposes and to regulate the same". There was no authority given to **contract** or to **regulate rates and charges.** The Corporation Commission received its jurisdiction from Section 18 of Article 9, to control transmission companies, and the Pioneer Company came within the definition of transmission Companies as given in Section 34 of Article 9, In that case the Court said:

> "Assuming, but not deciding, that subdivision 20 of Section 512, supra, is applicable to cities of the first class, we connot agree with appellant that thereby the power to fix telephone rates was granted by the Legislature to the city".

In the McAlester case, supra, the Court was called upon to construe a franchise entered into prior to Statehood, and in the Indian Territory, under laws that did not pretend to give the municipality the right to **contract** or to **regulate the charges for public services.** Franchises that were not made under authority given by the Constitution, as in the instant case.

HOME TELEPHONE CASE.

We come within the rule announced by this Court in Home Telephone Co. v. Los Angeles, 211 U. S. 265, where this Court said:

> "No other body than the supreme Legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient."

In the instant case the supreme authority is the people, and they have spoken through the State Constitution, wherein authority has been conferred to legislate franchises, with a limitation that "the power to regulate the charges for public services" shall never "be surrendered". And why shall the power to regulate charges never be surrendered? Because, at some future time a new Constitution may be adopted by the people, and then it may be determined that the right

granted to municipalities touching franchises was a mistake, and they do not want outstanding contracts touching rates and charges that are binding and cannot be changed. So the people said, "the power to regulate the charges for public services" shall never "be surrendered."

Respectfully submitted,

Preston A. Shinn,
For Plaintiff in Error.

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No. 281.

In the Supreme Court of the United States

OCTOBER TERM, 1918.

THE CITY OF PAWHUSKA,
Plaintiff in Error

v

PAWHUSKA OIL & GAS COMPANY, and
THE STATE OF OKLAHOMA,
Defendants in Error

In Error to The Supreme Court of The State of Oklahoma.

BRIEF AND ARGUMENT OF PAWHUSKA OIL AND GAS CO., DEFENDANT IN ERROR.

T. J. LEAHY,
C. S. MACDONALD,
BURDETTE BLUE.

Attorneys for Pawhuska Oil & Gas Co.

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Defendants in Error

In Error to The Supreme Court of The State of Oklahoma.

BRIEF AND ARGUMENT OF PAWHUSKA OIL AND GAS CO., DEFENDANT IN ERROR.

STATEMENT OF CASE.

The question raised in this case is whether or not the Corporation Commission of the State of Oklahoma, in providing for an increase of rates for the sale of gas by the Pawhuska Oil & Gas Co. to the inhabi-

tants of the City of Pawhuska, and requiring that all gas sold by the Pawhuska Oil & Gas Co. be sold through meters, at meter rates, violated the provisions of Section 10, Art. 1 of the Constitution of the United States, in that by said order the Corporation Commission impaired the obligations of a contract entered into between the City of Pawhuska and the Pawhuska Oil & Gas Co., in 1909.

The Pawhuska Oil & Gas Co. was granted a franchise by the City of Pawhuska, through initiative petition on the 12th day of October, 1909. Under the laws of the State of Oklahoma, franchises may be granted in two ways; one by the mayor and council, or Board of Commissioners, with referendum to the people, or by an initiative petition on the part of the people themselves, without action on the part of the mayor and council, or Board of Commissioners. It is immaterial, so far as the rights and duties of a company obtaining a franchise, which way it is granted. The franchise in this case was granted to the Pawhuska Oil & Gas Co. about two years subsequent to the adoption of the state constitution. A full and complete copy of said franchise will be found on pages 9, 10 and 11 of the record. Whatever rights the city of Pawhuska had to grant the franchise must be found in the constitution and the laws of the State of Oklahoma. Art. 18 of the Constitution of the State of Oklahoma has to do with municipal corporations, and in connection therewith deals with the matter of franchises granted by such corporations. At the time the franchise in question was granted, the City of Pawhuska did not have a charter form of government, but was governed by a

mayor and council. At that time cities were authorized by the law of the state to grant franchises to municipal companies, giving them the right to use the streets and alleys for the purpose of the utility. The special statute giving cities this right, is Sec. 593 Rev. Laws of Okla. 1910. Subsequent to the enactment of that statute, the legislature, by Chap. 93, Session Laws of Okla., 1913, p. 150, conferred jurisdiction upon the Corporation Commission of the State of Oklahoma to fix rates for public utilities. It is claimed in this case, that said Chap. 93, Session Laws of Okla., 1913, violated the Constitution of the State of Oklahoma, with reference to municipal corporations, and that since the Corporation Commission of the State of Oklahoma in this case acted under the authority of said statute, that their order is void, for the reason that it impaired the obligations of a contract existing between the Pawhuska Oil & Gas Co. and the City of Pawhuska, growing out of said franchise. The contention of the Pawhuska Oil & Gas Co. is that Chap. 93, Session Laws of 1913, is entirely consistent with the constitution of the State of Oklahoma, and superseded Sec. 593, Rev. Laws of Okla., 1910, in so far as it conferred the right to fix rates for public utilities upon the Corporation Commission, and took that right away from municipalities. It must be borne in mind that the franchise in this case was granted subsequent to statehood and, was subject to the provisions of the constitution of the state. It must also be borne in mind that while Sec. 593, supra, is substantially the same as Sec. 398, Vol. 1 of Wilson's Statutes of 1903, the same was continued in force

on the incoming of statehood, under the terms and conditions of the constitution of the state.

The Supreme Court of the State of Oklahoma has on several different occasions construed the constitution of the state with reference to the power of municipalities to grant franchises, and with reference to the right of the state by legislative enactment to change or modify franchises granted by cities, with reference to rates, and in each instance, as well as in the present case, the Court gave an entirely different construction to the meaning of the constitutional provisions and the statutes to that which is asked for by the plaintiff in error—the state Supreme Court always holding that the constitution of the state, in place of granting to municipalities the exclusive right to make franchises and fix rates, specifically denies that exclusive right to cities, and retains the power to do so in the state whenever the state may see fit to exercise the power. It is contended by the Pawhuska Oil & Gas Co., that under the record in this case, the precise question involved has been repeatedly decided contrary to the contentions of the appellant, by the Supreme Court of the State of Oklahoma, and by this Court. The transcript of record in this case, and the brief of the appellant, sufficiently set forth the various orders and statutes, so that we do not deem it necessary at this time to repeat them.

BRIEF AND AUTHORITIES.

The State, through the Corporation Commission, has the right to change rates fixed by franchise, especially where the franchise was granted subsequent to statehood, and in doing so does not violate Sec. 10 of Art. 1 of the Federal Constitution.

Section 7, Article 18, Constitution of Oklahoma.

Chapter 93, Session Laws of 1913, page 150.

Pawhuska Oil & Gas Co. v. *City of Pawhuska*, —Okla.—, 148 Pac. 118.

Pioneer Telephone Company v. *State*, 33 Okla.724, 124 Pac. 173.

South McAlester v. *Eufaula Telephone Co.*, 25 Okla. 524, 106 Pac. 962.

City of Pawhuska v. *Pawhuska Oil & Gas Co.*, 166 Pac. 1058.

City of Kenashaw v. *Kenashaw Telephone Co.*, 135 N. W. 849.

Benwood v. *Public Service Commission*, 83 S. E. 295.

Milwaukee Electric Railway and Light Company v. *Railroad Commission of Wisconsin*, 238 U. S. 174.

City of Englewood v. *Denver & South Platte Ry. Co.*, Adv. Op. U. S. Sup. Ct., p. 149, Feb. 1, 1919.

Raymond Lumber Co. v. *Raymond Light and Water Company*, 159 Pac. 133.

City of Manitowoc v. *Manitowoc and Northern Traction Company*, 129 N. W. 925.

Borough of Belvue v. *Ohio Valley Water Company*, 91 Atl. 236.

J. I. Case Plow Works Company v. *Oklahoma Gas and Electric Company*, P. U. R. 1915 B, 183.

City of Henryetta v. *Smith and Swan Gas Company*, order Corporation Commission, 1324.

Temp v. *Mountain States Telephone and Telegraph Company*, P. U. R. 1915 D, 716.

Yeatman v. *Towers*, P. U. R. 1915 E, Atl. 158.

Landon v. *Lawrence*, P. U. R. 1915 E, 763.

In re Augusta Water District P. U. R. 1916 E, 31.

In re Murray & Fletcher, 2nd Calif. R. C. R. 464.

In re Lake Helmet Water Company, P. U. R. 1917 A, 448.

In re United Fuel & Gas Company, P. U. R. 1917 A, 923.

Water, Light & Gas Co. v. *Hutchinson*, 52 L. Ed. 257.

Home Tel. & Tel. Co. v. *Los Angeles*, 53 L. Ed. 176.

The State has a right, in the interest of conservation, and to prevent waste and discrimination, to require that all gas be sold through meters at meter rates, and in doing so does not violate Sec. 10 of Art. 1, of the Federal Constitution.

Pawhuska Oil & Gas Company v. *City of Pawhuska.*, —Okla.—, 148 Pac. 118.

Commonwealth v. *Trent*, 77 S. W. 390.

Townsend v. *State*, 37 L. R. A., 294.

Jamison v. *Indiana Natural Gas and Oil Company*, 12 L. R. A. 652.

Hawthorne v. *National Carbonic Gas Company*, 23 L. R. A. (N. S.) 436.

C. B. & Q. R. R. Co. v. *State of Nebraska*, 17 Supreme Court Reporter, U. S. 513.
Thornton Oil and Gas Co., Sec. 398.
Arizona Corporation Commission v. *Morenci Water Company*, P. U. R. 1916 E. 387.
Wood v. *Village of LaFarge*, P. U. R. 1917 A. 763.
Auto Supply Company v. *Central Illinois Public Service Company*, P. U. R. 1915 B. 205.

"The decision of the highest court of a state, denying the existence of the contract alleged, being in harmony with the constitution and laws of the state, as expounded by the decisions of the highest courts of the state, will be followed by this court."

S. McAlester v. *Eufaula Tel. Co.*, 25 Okla., 524, 106 Pac. 962.
Pioneer Telegraph & Telephone Co. v. *State*, 33 Okla., 724, 127 Pac., 1073.
Pawhuska Oil & Gas Co. v. *City of Pawhuska*, 148 Pac., 118.
City of Pawhuska v. *Pawhuska Oil & Gas Co.* 166 Pac. 1058.
Milwaukee Electric Railway & Electric Light Co. v. *Railroad Commission of Wisconsin*, 238 U. S. 174, 59 L. Ed. 1254.
City of Englewood v. *Denver & S. Platte Ry. Co.*, U. S. Supreme Court Advance Opinions, Feb. 1st, 1919, p. 149.

ARGUMENT.

The State, through the Corporation Commission, has a right to change rates fixed by franchise, especially where the franchise was granted subsequent to statehood, and in doing so does not violate Sec. 10, Art. 1, Federal Constitution.

It is earnestly contended for by counsel for the a
pellant that the franchise between the Pawhuska G
and Gas Company and the City of Pawhuska, is
contract of such a nature that the State cannot alt
the same by legislative enactment or by order of t
Corporation Commission under powers delegat
to it by the State and that to do so would be in viol
tion of the constitutional rights of the city again
impairing the obligations of contracts. It is insist
that Section 593 of the Laws of 1910, which was t
statute in force at the time the franchise was gran
ed, with a slight modification made by the Co
Commission, and which is not material so far as th
case is concerned, is a specific grant of power to t
council of the city to provide by ordinance for t
lighting of the streets of the city and the fixing
prices to be paid for gas and light and it is such
grant of power as cannot be withdrawn by the sta
from the city so as to affect any contracts or fra
chise in existence at the time the authority is wit
drawn. That this grant of power is protected
Section 18, Art. 9, of the Constitution of Oklahom
apparently counsel have overlooked Section 35
Art. 9 of the Constitution which says:

> "After the second Monday in Januar
> Nineteen Hundred and Nine, the Legislatu
> may, by law, from time to time, alter, amen
> revise or repeal Sections Eighteen to Thirt
> four, inclusive, of this article, or any of the
> or any amendments thereof."

Chapter 93, Session Laws, 1913, page 15
is an amendment or a repeal of Section Eightee
Article 9 of the Constitution in so far as said sectio
may relate to the proposition herein involved.

The Corporation Commission, in passing upon the contention, on the part of the city, says:

> "The Commission has heretofore considered the question of its authority to change rates fixed by franchise and has not hesitated to prescribe a different schedule of rates than that provided by franchise where the facts justified. This was the position taken in the case of *J. I. Case Plows Works, et al* v. *Oklahoma Gas and Electric Company*, Cause 1987, Order No. 911, P. U. R., 1915 B, 183, wherein the Commission, in ordering a reduction of electric power rates, said:
>
> 'It is contended by the defendant that it is only complying with the ordinance which was adopted by the voters of Oklahoma City. The Corporation Commission, however, may alter rates established by franchise, * * * * * * *, Chapter 93, Session Laws of 1913, page 150, confers jurisdiction upon the Commission to fix rates, prescribe regulations, service and practices of water, heat, light and power companies and gives the commission general supervision over such utilities.
>
> 'Whether the minimum rate provided in the franchise was reasonable depended upon the conditions that existed at the time the franchise was adopted by the people. The Commission must now determine the reasonableness of this minimum rate under the conditions and facts disclosed by the evidence in this case.'
>
> In Cause No. 2584, Order 1314, *City of Henryetta* v. *Smith & Swan Gas Company*, the Commission said:
>
> 'The Commission is of the opinion that when the franchise under consideration was grant-

ed, the municipality of Henryetta was without authority to exercise the legislative function of rate making to the extent of suspending the right of the sovereign authority to exercise same upon proper occasion.'

The Commission herein cited a number of cases upholding this position of the Commission, among them the case of *Benwood* v. *Public Service Commission*, 83 S. E. 295, 55 L. R. A. (N. S.) 261, wherein the Supreme Court of West Virginia sustained an order of the *Public Service Commission of Milwaukee Electric Railway & Light Company* v. *Railroad Commission of Wisconsin*, 238 U. S. 174, wherein the Supreme Court of the United States affirmed a decision of the Supreme Court of the State of Wisconsin sustaining a decision of the Wisconsin Railroad Commission changing rates fixed by franchise.

The case of the *Pioneer Telephone & Telegraph Co.* v. *State et al.*, 33 Okla., 724; 127 Pac. 1073, should be controlling as to the right of the Corporation Commission to change rates fixed by franchise. Therein the Court held that the order of the Commission and not the franchise provision governed telephone rates. The position of the city that there is a material distinction between the issue involved in that case and the present case is, we think, not well taken. Therefore, the Commission holds that it has authority to prescribe a schedule of rates for the City of Pawhuska, regardless of any franchise or contract existing between the City of Pawhuska and the Gas Company."

This position of the Corporation Commission is amply justified and fully supported by the decisions

of the Supreme Court of Oklahoma and the decisions of the Supreme Courts of other states and the Public Service Commissions of other states. The question was directly before the Supreme Court of Oklahoma in the case of the *Pawhuska Oil and Gas Company* v. *City of Pawhuska*, 148 Pac. 118. In that case the question directly involved was the rights of the state to enact the law approved February 28, 1913, requiring that gas be sold through meters at meter rates. It was there urged by the City of Pawhuska, as it is now urged, that the law was in contravention of contractual relations between the city and the company, the obligations of which, the State could not impair. The Court, in that case, said:

> "In support of the action of the court, in perpetually enjoining the company, as stated, it is urged that the franchise, fixing, as it does, both a flat rate and a meter rate, constitutes a contract between the city and the company, the obligation of which, the state cannot impair, as is attempted by the act aforesaid. This was, in effect, the holding of the trial court and that said act is void. The court erred; This for the reason that said act was one of police regulation intended to prevent the waste of gas. The very act authorizing the city to grant this franchise is entitled 'An act to regulate the use and preservation of oil and gas, * * * *,' and stripped to the point, gives this and like companies authority to build pipe lines through the streets and alleys of the municipalities of this state with the consent and 'subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted.' Which shows the intent of the state to be, in authoriz-

ing the municipality to grant this franchise, to reserve to the municipality, notwithstanding the terms of the franchise, the power to police the business of distributing gas thereunder in that municipality. This police power had theretofore been reserved both to the state and to the city. Article 18, Chapter 7, of the Constitution provides:

'No grant, extension or renewal of any franchise or other use of the streets, alleys or other public grounds or ways of any municipality, shall divest the state, or any of its subordinate subdivisions of their control and regulation of such use and enjoyment.'

Having been expressly reserved by said section of the Constitution to both the state and the municipality, and again expressly reserved to the city by the act authorizing the municipality to grant the franchise, the reservation of the power was as much a part of the franchise as if written therein. It follows that whether the franchise amounted to a contract between the city and the company we need not say, for, sure it is, the state, by the act complained of, had a right to say to the company, as it did in effect by the terms of said act, that in the interest of the conservation of the natural resources of the state, the company shall no longer be permitted to sell gas at a flat rate, but thereafter was required to furnish the same to its customers (with certain exceptions named in the act) through standard meters and at meter rates. And this was a proper exercise of police power."

The same proposition was before the same court in the case of *Pioneer Telephone and Telegraph Com-*

pany v. *State*, 127 Pac., page 1073. Paragraphs 1 and 2 of the syllabus read as follows:

> "Power on the part of an incorporated city or town to fix municipal telephone rates can only be derived from the supreme Legislature by express grant or by necessary implication from powers expressly granted.
>
> Where a municipality with no power to fix municipal telephone rates, by ordinance pursuant to subdivision 20 of section 512 of Wilson's Rev. & Ann. St. 1903, granted to a telephone company the right to occupy and use its streets and public ways, subject to certain police regulations, and by section 9 said ordinance fixed municipal telephone rates, held, that said section to that extent is void, although accepted and acted upon between the parties in interest and is not protected by article 9, chapter 18, of the Constitution, so as to prevent the Corporation Commission from establishing another or different rate pursuant to the same article and section."

This question was before the Supreme Court of Washington in the case of *Raymond Lumber Company* v. *Raymond Light and Water Company*, 159 Pac. 133. That court, on page 135 referring to this specific question, uses the following language:

> "The question then arises, if the contract was valid at time it was entered into, can it be determined under the provisions of the Public Service Commission Law subsequently passed? As already stated the water company was a public service corporation, and jurisdiction over its rates and service was conferred by the Public Service Commission Law upon the Public Service Commission. The

power to regulate and control the rates of public service corporations is within the legitimate exercise of the police powers of the state. This power may be exercised by the Legislature itself by enacting a law fixing rates, or the legislature may delegate the power to fix rates to a properly constituted commission, subject to judicial review. *State ex rel. Webster* v. *Superior Court*, 67 Wash, 37, 120 Pac. 861, L. R. A. 1915 C, 287 Ann. Cas. 1913 D, 78. In this state the Legislature has conferred the rate making power upon the Public Service Commission by the Public Service Commission Law.

It is contended that even though the state under its police power may fix the rates to be charged by public service corporations, that notwithstanding this fact a contract, valid when entered into, is but subject to be abrogated under the provisions of a law subsequently enacted. The contention cannot be sustained. The rule is that contracts upon subjects which are within the police power, even though valid when made, must be taken to have been entered into in view of the continuing power of the state to control the rates to be charged by public service corporations."

The Supreme Court of Wisconsin, in the celebrated case of the *City of Manitowoc* v. *Manitowoc and Northern Traction Company*, 129 N. W., page 925, in considering the powers of the railroad commission of that state to fix rates, after an exhaustive examination of all the authorities, in the opinion of the case, says:

"No specific authority having been conferred on the city to enter into the contract in

question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent and to this extent only is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting *section* 1852 *of section* 1863, St. 1898, the state intended to surrender its governmental power of fixing rates, that power was only suspended until such time as the state saw fit to act. *City of Ashland* v. *Wheeler*, 88 Wis. 607, 60 N. W. 818; *Home Telephone & Telegraph Co.* v. *Los Angeles*, supra; *Freeport Water Co.* v. *Freeport*, supra; *Stanislaus Co.* v. *San Joaquin. etc. Co.*, *supra*. Furthermore, the right conferred on a railroad company to use the public streets, under *section* 1862 of *section* 1863, becomes one of the corporate franchises of the corporation to which it is granted, the city acting as the delegated agent of the state in granting it. *State ex rel* v. *Mattison*, *St. R. R. Co.*, 73 Wis. 612, 40 N. W. 487, 1 L. R. A. 771; Wright Mer. & L. Co., 95 Wis. 29, 36, 69, N. W. 791, 36 L. R. A. 47, 60, Am. St. Rep. 74; *State ex rel* v. *Anderson*, 90 Wis. 550, 565, 63 N. W. 746; *State* v. *Superior Court*, 105 Wis. 651, 673, 81 N. W.1046, 48 L. R. A. 819; *State* v. *Portage Water Co.*, 107 Wis. 441, 445, 83 N. W. 697; *Allen* v. *Clausen*, *supra*. This being so, the reserve power of amendment or appeal, contained in section 1, art. 11, Const., would seem to empower the Legislature to modify the condition on which such franchise was given, as well as to repeal or amend the franchise itself. *Chapin* v. *Crusen*, 31 Wis. 209; *West Wis. R.*

R. Co. v. *Supervisors*, 35 Wis. 267; *Attorney General* v. *Railway Cos.* 35 Wis. 425."

It is not deemed necessary to quote from all the decisions of the various states on this question. That the state may, by legislative enactment change the terms of a franchise such as that under question, or may empower the Corporation Commission to do so is settled by the decisions of this court and of the decisions of the state supreme courts. That the various public service commissions in the country are holding to this same doctrine, we think is likewise true. In the case of *Re Lake Helmet Water Company* P. U. R. 1917 A, page 458, the California railroad commission had before it the same question and in paragraph 3 of the syllabus declared the law to be:

> "The fixing of rates by the California Commission different from those prescribed in service contracts does not deprive rate payers of property without due process of law, or impair the obligations of the contracts, in violation of provisions of the state and Federal Constitution, since the contracts are subject to the reserve power of the state to alter or amend in the exercise of the power to regulate public utilities."

In the opinion in the case page 467 it uses the following strong language.

> "The consumers further urge that the establishment of rates herein by the Railroad Commission would impair the obligations of their contracts with petitioner, in violation of paragraph 10 of art 1, of the Federal Constitution.

> That every public utility which enters into a contract for service to a consumer does so subject to the reserve power of the state to alter or amend such contract in the exercise of its power to supervise and regulate public utility is clearly established by the authorities. We refer to the following decisions of the Railroad Commission and to the authorities therein cited:
>
> *Re Murray*, 2 Calif. R. C. R. p. 464; *Ukiah* v. *Snow Mountain Water and P. Co.*, 4 Calif. R. C. R. p. 293; *Sausalito* v. *Marin Water and Power Co.*, 8 Calif. R. C. R. p. 252.
>
> We are satisfied, after a careful review of the objections urged by the consumers herein, that the Railroad Commission has jurisdiction in this proceeding, and that it is our duty to establish just and reasonable rates to be charged by the petitioner."

In the case of *Reunited Fuel Gas Company*, P. U. R. 1917 A, page 923, the Public Service Commission of West Virginia had before it the question of its power to increase rates of a public service company, and in paragraph 3 of the syllabus declared the law to be as follows:

> "The West Virginia Commission has power to increase the rates of a public service company notwithstanding a franchise provision that the rates shall in no case exceed the schedule specified therein."

And in the opinion of the case, page 928 and 929, says:

> "The protestant, the town of Ceredo, questions the authority or jurisdiction of the Commission to change the rates in Ceredo because of the following provision in the franchise un-

der which the applicant company is operating:

> " 'And be it further ordained that said party or his assigns, as a condition of the exercise of the privileges and grants contained herein, or any of them, shall furnish for public and private use to said town and its inhabitants such natural gas for the purpose aforesaid, at a reasonable price and in no case to exceed the schedule of rates charged by the said O. Germer, Jr., or his assigns, in the City of Huntington, under a franchise owned by them in said city, * * * "
>
> The Commission has passed upon this question in two cases, to-wit: The City of Benwood against the Public Service Commission and Re Glenville Natural Gas Company. In both of which cases it proceeded without regard to the express terms of the franchise; the language used in said cases being almost identical with the language here used. The former case was reviewed by the supreme court and the Commission sustained. *Benwood* v. *Public Service Commission*, 75 W. Va. 127, L. R. A. 1915 C. 261, 83 S. E. 295; *Re Glenville Natural Gas Co.* P. U. R. 1915 F, 848."

The Public Utilities Commission of Maine, in the case of *Re Augustus Water Disrict* P. U. R. 1916 E, 31, treating of the same question, declares the law in the fourth paragraph of the syllabus to be as follows:

> "Assuming that a municipal franchise contract providing for free water for municipal and fire protection purposes was valid when made, its performance becomes unlawful by virtue of a subsequent statute providing that all individuals, firms and corporations,

whether private, public or municipal, shall pay the rates established by a board, and that the rates shall be uniform, since it was competent for the legislature to waive any contract rights of the muncipality without infringing the constitutional provision against impairing the obligation of a contract."

And on page 43 uses the following language in the opinion:

> "In *Sausalito* v. *Marin Water & Power Co.* P. U. R. 1916A, 244, the same Commission says: 'Now, however, it is unanimously held that the provisions of the Federal Constitution forbidding laws impairing the obligation of contracts, and declaring that property shall not be taken without due process of law, have no application to the regulation and supervision of public utilities by the state, under its police power. No public utility can, by the simple device of entering into contracts with its consumers, withdraw itself from the state's control. All such contracts, whether made before or after the state actually undertakes the supervision and control of public utilities, must be taken to have been made subject to the state's right to exercise its power of supervision and control whenever it sees fit to do so. Citing *Odd Fellows Cemetery Asso.* v. *San Francisco*, 140 Cal. 226, 73 Pac. 987; *Chicago B. & Q. R.* v. *Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Manigault* v. *Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127, and many other cases with extracts from them."

Perhaps the most exhaustive opinion to be found upon the question of rate making by a public serv-

ice commission is that of the Kansas Public Utilities Commission in the case of *Landon* v. *Lawrence*, P. U. R. 1915E, 763. In paragraph 10 of the syllabus that commission declares the law to be as follows:

> "Franchise ordinances requiring gas companies to furnish service free to cities in consideration for use of the streets do not interfere with the power of a public service commission to fix the proper rates therefor, since such ordinances are not contracts protected against impairment by the provisions of paragraph 10 of the Federal Constitution."

And on pages 794 and 795 in the opinion, the Commission used the following strong language:

> "The furnishing of 'free gas' to cities in consideration for the use of streets in compliance with terms of ordinances is a species of patent discrimination against those consumers who are required to pay scheduled prices, and it should therefore be promptly discontinued.
>
> "Rates for natural gas should be fixed so as to provide for a reasonable margin of return for unexpected outlays liable to occur in conducting so hazardous an enterprise, and, since the public is vitally interested in the continuation of the service, no unreasonable restriction should hamper the company in reaching a new source of supply and serving the public as long and as well as practicable."

The Arizona Corporation Commission had also had this same question before it in the case of *Tempe* v. *Mountain States Telephone and Tele-*

graph Company, P. U. R. 1915 D, p. 716. That Commission also reached the conclusion that prior franchise contracts providing for certain rates did not affect the power of the state through the Commission to provide for other and different rates and in the syllabus announces the law as follows:

> "The power of the Arizona Commission to regulate the rates of the telephone company is not affected by prior franchise contracts providing that certain rates should be charged and that certain free service should be supplied the municipality, where the only power to make such a contract is to be found in a general statutory provision giving the municipality exclusive control over its streets, alleys, avenues and sidewalks."

As has been specifically held in the foregoing cases, the right of the state to amend or alter franchises is always reserved unless specifically otherwise provided. Hence, the rights of the state, either by legislative enactment, directly or indirectly, by power conferred upon the Corporation Commission to change rates at any time it sees fit, when public service demands it cannot be questioned. To hold different at this time would be to overrule the former opinions of the supreme Court of Oklahoma in the cases of the *Pawhuska Oil and Gas Company* v. *City of Pawhuska; Pioneer Telephone Company* v. *State*, and the *South McAlester Eufaula Telephone Company* v. *State, supra.*

The State has a right, in the interest of conservation and to prevent waste and discrimination to require that all gas be sold through meters at

meter rates, and does not violate Sec. 10, Art. 1, of the Federal Constitution.

It is the announced doctrine in the state of Oklahoma, both by legislative enactment and the decisions of the highest court, that the state has the right to enact laws, the purpose and object of which is conservation and to prevent the waste of its natural resources. This was specifically declared in the case of *Pawhuska Oil and Gas Company* v. *City of Pawhuska*, 148 Pac. 118, in which the court definitely held that it was within the police powers of the State to enact legislation that would prevent waste of natural gas by requiring that all gas be sold through meters at meter rates. It is a well settled doctrine that the sale of gas or water or electricity at a flat rate brings about waste and extravagance in the use of those commodities and also causes such discrmination between consumers as to be unlawful and wrong.

The question of control over public utilities with reference to their service in supplying these commodities to the public was definitely placed in the hands of the Corporation Commission by Section 2 of Chapter 93, Session Laws, 1913, page 150, which reads as follows:

> "The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations affecting their services, operations, and the management and conduct of their business; shall enquire into the management of the business thereof, and the method in which same is

conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the constitution and laws of this State, and with the orders of the Commission."

On the question of the right of the Commission to require the installation of meters, the Commission says in its opinion in this case, pages 18, 19 and 20, of the Transcript of Record.

"The Commission can also order the installation of meters if the facts justify it. Chapter 93, Session Laws 1913, provides in part as follows:

'Sec. 2. The Commission shall have general supervision over all public utilities with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operations and the management and conduct of their business; shall enquire into the management of the business thereof, and the method in which the same is conducted.

'Sec. 3. In addition to the powers enumerated, specified, mentioned or indicated in this act, the Commission shall have all additional, implied and incidental powers which may be proper and necessary to carry out, perform and execute all powers herein

enumerated, specified, mentioned or indicated.' * * *

"Counsel for the city in their brief cite Chapter 200, Session Laws 1915, to uphold their contention that this Commission has no authority to require the installation of meters or to prescribe meter rates. This law, we think, was in no way intended to limit the Commission in the exercise of its authority to regulate gas companies.

"In the case of the *Pawhuska Oil and Gas Company* v. *City of Pawhuska*, 148 Pac. 118, the Supreme Court upheld the right of the gas company to install meters under Chapter 152, Session Laws 1913. Chap. 200, Session Laws 1915, in no wise prevents the commission from requiring the installation of meters when the facts show that such a requirement would be justified. As heretofore pointed out, the regulations of the Secretary of the Interior, to which the gas company's lease is subject, provides that gas shall be sold through meters. Failure to comply with this requirement may mean cancellation of the lease and that the gas company would be deprived of the source of its supply.

"It is a matter of common observation that the consumption of gas, water or electricity, on a flat rate, not subject to a meter measurement or affected by the quantity consumed, is productive of waste. A consumer of natural gas who is paying for the amount he uses on a flat rate instead of a meter basis, will ordinarily consume much more than he would if he were paying for it on a meter basis. Stoves and lights will be allowed to burn when there is no necessity for burning them, and will consume greater

quantity than there is any necessity of consuming. The history of natural gas consumption shows that where consumers have been allowed to pay for the amount they use on a flat rate, that it has been no uncommon thing to allow lights to burn day and night, whether they needed it or not. Investigation by the Commission shows that more than one gas company in this state has been compelled to do business at a loss due solely to the fact that consumers were allowed to pay for gas on a flat rate and thereby use more than was necessary and more than was paid for at reasonable meter rates.

Exhibits filed in this case and not excepted to by counsel for the city show that certain consumers used one-third more gas on the flat rate than they do on the meter basis. (Gas Company exhibts I, J, K and L.) The unnecessary use of gas, i. e. the consumption of amounts in excess of that required for the comfort of the necessity of the consumer is waste. Furthermore, flat rates are discriminatory. Exhibits in this case show that consumers purchasing gas on a flat rate are paying at least 25 per cent. less than those who purchased gas through meters. This is an unlawful discrimination. All consumers of each class should be treated alike and no difference should be made in rates because a part of the consumers are allowed to buy gas on a flat rate, whereas others are on a meter basis. A portion of the consumers who pay for gas on a flat rate will be provident in the use of gas. Some will use an unnecessary amount and will therefore throw the burden of their extravagance on the other consumers.

"The Commissions of the various states have generally held that meter service should be required in order to prevent waste and to provide against discrimination.

"The Wisconsin Railroad Commission in the case of *Charlesworth* v. *Omro Electric Light Company*, P. U. R. 1915B, page 13, said:

" 'The Commission has found repeatedly that flat rates lead to waste of service and inequality of charges.'

"In the case of *Wood* v. *La Farge*, P. U. R. 1917A, 783, the same Commission said:

" 'The present flat rate schedule, in addition to being inequitable as between consumers, is doubtless responsible for a considerable amount of waste in that flat rate users invariably grow careless and allow faucets to remain open when water is not actually required or fail to have leaky fixtures repaired.

In the case of *Redding* v. *Northern California, P. Ro.*, P. U. R. 1916 F, 839, the California Railroad Commission said:

'It is believed that if meters are installed, and, in consequence, water waste is reduced, better pressure will result.'

An additional argument for installation of meters is a probable reduction in operating expenses. * * * * The power bill for pumping now amounts to 60 per cent to the total operating expenses of the plant. The water use for 1915 totals 591 gallons per capita per day. This is found to be an excessive use in comparison with towns of similar population and location where metering

has been resorted to. If a reduction in the use of water is brought about there should be a corresponding reduction in the power bill and operating expenses. With rates based on the cost of service, it is evident that the interest of the consumer lies in the installation of meters. A provision governing the installation of meters should be embodied in rules and regulations to be filed with the Commission.

The Commission finds that the installation of meters in the present case would tend to prevent waste, eliminate discrimination, increase the revenue and operating expenses of the gas company, and lessen the burden of the consumers by reducing expenditures which it would be necessary for them to make for gas and oil to allow the company to make a return on its investment and to take care of depreciation.

This position of the Commission is sustained not only by the highest court of this state but by the highest courts of other states in cases where the same question has been before them. In the case of *Commonwealth* v. *Trent, et al.* 77 S. W. 390, the Supreme Court of Kentucky in treating a statutory amendment for the prevention of waste of gas said in the 6th paragraph of the syllabus the following:

"Acts 1891-93, page 60, 61 (Ky. St., Sec. 3910, 3914) enacted for the prevention of the waste of gas and enjoining the plugging of wells not in use, was within the legislative power to enact as a protection of the natural resources of the state, to the rights of the public to which the rights of individual

owners are subject. And in the opinion in that case gave to us the following language:

> 'The position that the defendants may do what they please with the gas after it is reduced to possession cannot be maintained. For, as the gas goes out of the gasometer, its place is taken by other gas coming in from the well. Property is the creation of law. The use of property may be regulated by law. The legislature may protect from waste the natural resources of the state, which are common heritage of all. The right of the owner of property to do with it as he pleases is subject to the limitation that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of gas would be to deprive the state and its citizens of the many advantages incident to its use. That the legislature may prevent this is well settled. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44, L. Ed. 729; *State* v. *Ohio Oil Co.* (Ind.) 49 N. E. 809, 47 L. R. A. 627; Donahue on petroleum and gas, Sec. 23.'

In the case of *Townsend* v. *State*, 37 L. R. A. in which the appellant has been prosecuted for burning natural gas for illuminating purposes in what is known as flambeau lights, the court held the statute valid and not in interference with property rights and not violative of any constitutional guarantee. Touching upon the right of the state to exercise its police power when the public interest demands the same, the court says:

> "In *Lawton* v. *Steele*, 152 U. S. 133, 38 L. Ed. 385, Mr. Justice Brown of the Supreme Court of the United States, delivering the

opinion of that court, said: 'The extent and limit of what is known, as a police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the discussion or abatement by summary proceedings of whatever may be regarded as a public nuisance. * * * * Beyond this, however, the state may interfere whenever the public interests demand it; and in this particular, a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.

"If this be a correct enunciation of the law on the subject in hand—and we think it is—it disposes of much of the argument of the learned counsel as to the question of facts involved in the act in question, as to whether in fact burning natural gas by flambeau lights is a waste of natural gas. When the legislature enquired into that fact, their determination was conclusive on the courts. *Gentile* v. *State*, 29 Indiana 415, 417; *Jameson* v. *Indiana Natural Gas and Oil Company*, 128 Ind, 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613; *Mode* v. *Beasley*, 143 Ind. 306 and cases cited on page 315, 143 Ind.; *Woods* v. *McCay*, 144 Ind. 136, 33 L. R. A. 97, and cases cited on pages 322, 323, 144 Ind.; *Jackson County Comrs.* v. *State*, Brown (Ind.) 46 N. E. 908."

In the case of *Hawthorn* v. *National Carbonic Gas Company*, 23 L. R. A. (N. S.) 436, the Court of Appeals of New York had before it the proposition

of the legitimate exercise of the police powers of the state, and as will be seen in the report of this case, some of the most eminent lawyers of the state were interested and filed briefs, citing authorities, almost without number, upon the questions involved. Touching upon the police powers the court in that case said:

> "With the light thrown by the allegations of the complaint on the matter to which this provision relates, I should have no doubt that the latter was within the powers of the legislature, even if it were a new step in the realm of police or regulative legislation. But it is not of a new order, and, for the purpose of maintaining this proposition, I shall not discuss a great variety of legislative enactments held valid, which by analogy, seem to sustain this one, but shall come immediately to authority which directly sustained the present exercise of legislative power. In Cooley on Constitutional Limitations, 7th Ed. (page 829), it is said: 'The police power of a state, in comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.' This doctrine was quoted with approval in *People ex rel. New York Electric Line Company* v. *Squire*, 107 N. Y. 593, 605, 1 Am. St. Rep. 893, 14 N. E. 820. In *Com.*

> v. *Alger*, 7 Cush 85, it is said: 'Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

In the case of *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, the Supreme Court of the United States held valid a statute of Indiana which had for its object preventing the waste of gas. The opinion is very exhaustive and clearly establishes the right of the State by legislative enactment to prevent the waste of this most beneficial commodity.

That the sale of gas at a flat rate is not only a waste that should be prohibited, but that it is such a discrimination between consumers as to be unjust and wrong, is the conclusion that has generally been reached by the various public utilities commissions throughout the United States.

The Arizona Corporation Commission in the case of *Arizona Corporation Commission* v. *Morenci Water Company*, P. U. R. 1916 E, 387, in considering the question of flat rate, with an alternative of meter rates, found that the same was unsatisfactory, and in paragraph 4 of the syllabus says:

> "A system of flat rates, with an alternative of meter rates for the same class of water service, is unsatisfactory both to consumer and utility."

The Railroad Commission of Wisconsin in the case of *Wood* v. *Village of LaFarge*, 1917 A. page 763, in the second paragraph of the syllabus, says:

> "Flat water rates are discriminatory, and should be abandoned as meters are installed."

And in the opinion in the case on page 765, deals with the question as follows:

> "According to testimony adduced at the hearing, it is the desire of the complainants and the village board to place the water plant upon a self-supporting basis and to eliminate the unjust discrimination as between consumers, resulting from the application of flat rates. This attitude is to be commended. The present flat rate schedule, in addition to being inequitable as between consumers, is doubtless responsible for a considerable amount of waste, in that flat rate users invariably grow careless and allow faucets to remain open when water is not actually required, or fail to have leaky fixtures repaired. If a general installation of meters were made, it is certain that the present rather high pumpage with its resulting high expenses would be materially reduced, and the capacity of certain portions of the plant conserved, thus postponing the time of necessary enlargement of facilities, and improving the fire-protection service. As the village officials appear to be desirous of metering the system, the new schedule of rates will be worked out on that basis."

In the case *Auto Supply Company* v. *Central Illinois Public Service Company*, the Illinois State Public Utilities Commission, P. U. R. 1915 B, page 205 in the syllabus in the case says:

"An electric company was permitted to discontinue flat rate service under special contract with individual consumers in order to prevent discrimination, and was ordered to place meters on the service of all its customers and to charge for such service at its regular rates, subject to the further order of the Commission."

Discussing the question on pages 208 and 209, the Commission reached the following conclusions:

"It is unfortunate that, in the rapid development of public utility enterprises, more particularly those of an electrical nature, the companies serving the public had in many instances during the past seen fit to render service to consumers on bases entirely without justification from either the standpoint of the value of the service to the consumer or the cost of service to the company. In many cases, it would appear that rates of this nature have been developed solely from the standpoint of securing the business for the utility company without any very definite thought or consideration being given to what effect the rates paid by any individual consumer would have upon the rates paid by other consumers or the general practical economic conditions involved. In many cases rates so developed have been entirely unjust and discriminatory. The fact that such rates have been made is not a serious criticism to the utility as might at first seem to be the case. Since the study of proper rates for utility service, particularly as among the different classes of consumers, has received careful consideration only during recent years, and in fact many of the points involved are still a matter of serious conten-

tion and dispute. Despite these facts, however, the continuation under the present conditions of rates which are obviously discriminatory, and which are not open to all consumers in the community receiving service, is unfair and is in distinct violation of the public utilities law of the state. The number of consumers in Olney who are receiving service at other than the legal rates of the company is a very considerable proportion of the entire consumers in the city, being in the neighborhood of 25 per cent. Without the placing of meters on these consumers, it is, of course, impossible to state whether the rates which they are receiving are preferential and discriminatory or not, but experience with flat rates has clearly shown that the tendency of the consumer is to use current freely and without regard to his actual need for it, so that it is not unreasonable to assume that these rates are preferential and discriminatory, and the testimony leaves no room for doubt that the company has refused to give these rates to other consumers having similar service conditions."

Reference to cases cited under the head of Brief and Authorities, supra, we think will fully sustain the position we have taken. We have not seen fit to quote from each case cited but only to select a sufficient number of cases to fully cover the ground and to show that the general holding of the courts and the public utility commissions throughout the United States are in harmony with the holding of the Corporation Commission of the State in this case.

"The decision of the highest court of a state, denying the existence of the contract

> *alleged, being in harmony with the constitution and laws of the state, as expounded by the decisions of the highest courts of the state, will be followed by this court.*"

In direct conflict with the decisions of the highest courts of the state, plaintiff in error attempts to construe the provisions of Art. 18 of the Constitution of the State of Oklahoma, so as to give to municipal corporations exclusive power to fix rates, and in support of its contention, cites *Enid City Ry. Co.* v. *City of Enid*, 43 Okla. 779; also *Sapulpa* v. *Sapulpa Gas Co.*, 22 Okla., 348, and *Oklahoma City* v. *Oklahoma Street Ry. Co.*, 20 Okla. 1, apparently overlooking the fact that each of these cases grew out of franchises granted prior to statehood, and that none of them present the same question that is here presented. *In Enid City Ry. Co.* v. *City of Enid*, on p. 783, the Court uses this language:

> "It must be kept in mind that this contract was entered into prior to the adoption of our constitution, and that the reserve power therein is not applicable or involved here."

This statement by the Supreme Court is tantamount to a holding in that case that the constitution had reserved the power in the state to alter or amend franchises, notwithstanding the same may have been granted by a city, and that the only reason it sustained the grant in *Enid City Ry. Co.* v. *City of Enid*, was that the same had been granted prior to the adoption of the constitution.

We have heretofore quoted from the *Pawhuska Oil & Gas Co.* v. *City of Pawhuska, Pioneer Telephone Co.* v. *State*, and *S. McAlester* v. *Eufaula*

Telephone Co., to show the construction placed upon the provisions of Art. 18 of the Constitution of Oklahoma, and Sec. 2, Chap. 93, Session Laws of 1913, of Oklahoma. We now desire to quote from the opinion of the Supreme Court in the present case, 166 Pac., p. 1061, as follows:

> "The next question raised is that the order of the Corporation Commission is void, for the reason that it impairs the obligations of the contract entered into between the Pawhuska Oil & Gas Co. and the City of Pawhuska, and is therefore repugnant to section 15, art. 2 of the Constitution of the United States prohibiting the passage of any law impairing the obligations of contracts. The authority granted to the City of Pawhuska in this case, under section 593, Rev. L. Okla., 1910, to fix and regulate the charges for gas furnished the inhabitants of said City, was the power delegated to it by the state, and said City only had such right until such time as the state saw fit to exercise its paramount authority directly by a law enacted by the people through the initiative and referendum or the State Legislature, or indirectly by that legislative subdivision of the government having such power by virtue of its delegation by the supreme legislative authority. By chapter 93, Session Laws, 1913, such power was delegated to the Corporation Commission. No specific authority having been conferred by the Constitution upon cities to fix and regulate the charges for gas in municipalities the right existed in the state to withdraw the power delegated to the municipalities, whenever, in the judgment of the Legislature, the public interest required it. There are numerous authorities to this effect."

Also from pages 1063 and 1064, as follows:

> "It is urged that the power of municipalities to regulate the charges of any public service corporation is protected by the proviso in section 18, art. 9, of the Constitution, but as we have already seen, a public service company furnishing gas to the inhabitants of a municipality does not come within the terms of said proviso. *Shawnee Gas & Electric Co.* v. *Corporation Commission*, 35 Okla. 454, 130 Pac. 137.
>
> The second paragraph of section 7, art. 18, of the Constitution reads:
>
> "Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted."
>
> This language is found in art. 18 of the Constitution, entitled "Municipal Corporations," and from this fact it is argued that as the City of Pawhuska had the power to regulate the charges for public service at the time of the adoption of the constitution, the provision above quoted should be construed as an inhibition against the exercise of that power by the Corporation Commission or by the Legislature itself, and that the exercise of such power by the Legislature or the Commission would be tantamount to the surrender of the power by the city. We do not think the language susceptible of such construction. That part of Sec. 7, Art. 18, above quoted, prohibiting the surrender of the power to regulate the charges for public services, is a limitation upon the supreme legislative power, as well as upon the subdivision of the state government to which such power is

or may be delegated within constitutional limitations by the legislative branch of the government. It simply means that this power of sovereignty cannot be surrendered. Such limitation upon the state and its subordinate subdivisions can only be abrogated by repeal or amendment of sec. 7, art. 18 of the Constitution.

In the case of the *Pawhuska Oil & Gas Co.* v. *City of Pawhuska*, supra, it was noted that the power to regulate the charges for public services was reserved to the city and the state. We there said:

"That said act was one of police regulation intended to prevent the waste of gas. The very act authorizing the city to grant this franchise is entitled 'An act to regulate the use and preservation of oil and gas, * * * *,' and stripped to the point, gives this and like companies authority to build pipe lines through the streets and alleys of the municipalities of this state, with the consent and 'subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted.' Which shows the intent of the state to be in authorizing the municipality to grant this franchise, to reserve to the municipality, notwithstanding the terms of the franchise, the power to police the business of distributing gas thereunder in that municipality. This police power had theretofore been reserved both to the state and to the city. Art. 18, Sec. 7 of the Constitution provides: "No grant, extension or renewal of any franchise, or other use of the streets, alleys, or other public grounds or ways of any municipality shall divest, the state, or any of its subordinate

> subdivisons of their control and regulation of such use and enjoyment." Having been expressly reserved by said section of the Constitution, to both the state and the municipality, and again expressly reserved to the city by the act authorizing the municipality to grant the franchise, the reservation of the power was as much a part of the franchise as if written therein. It follows that whether the franchise amounted to a contract between the city and the company we need not say, for sure it is, that the state by the act complained of, had a right to say to the company, as it did, in effect, by the terms of said act, that in the interest of the conservation of the natural resources of the state, the company shall no longer be permitted to sell gas at a flat rate but thereafter was required to furnish the same to its customers (with certain exemptions named in the act) through standard meters, and at meter rates. And this was a proper exercise of police power."

We think the above shows conclusively what construction the State Supreme Court has placed upon the various constitutional provisions involved in this controversy, and that such construction is entirely different from the construction sought to be placed upon them by the plaintiff in error, and has been the construction placed upon said provisions at all times since the adoption of the Constitution of the State. We understand the rule to be in this court that the construction placed upon the Constitution and laws of a state by the highest court of the state, will be followed by this court. On this proposition, we desire to quote from the

Milwaukee Electric Ry. & Light Co. v. *Railroad Commission of Wisconsin*, 238 U. S., 174, L. Ed. 1254. The following language is used on p. 1260:

> "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a period given from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in *Home Teleph. & Teleg. Co.* v. *Los Angeles*, 211 U. S. 265, 273, 53 L. Ed. 176, 182, 29 Sup. Ct. Rep. 50:
>
> "The surrender, by contract, of a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself as well as the authority to make it must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make any such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of any other political subdivision of the state, are not sufficient. Specific authority for that purpose is required."

Again on pages 1260 and 1261, as follows:

> "It is true that this court has repeatedly held that the discharge of a duty imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligations of a contract requires this court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the state. While this is so, it has been frequently held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state in determining its meaning much consideration is given to the decisions of the highest court of the state. Among other cases which have asserted this principle, are *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493, and *Vicksburg* v. *Vicksburg Waterworks* Co., 206 U. S. 496, 509, 51 L. Ed. 1155, 1160, 27 Sup. Ct. Rep. 762.
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> In view of the weight which this court gives in deciding questions which involve the construction of legislative acts to decisions of the highest courts of the states in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed."

Recently, this court has had before it a case involving a similar proposition, the *City of Englewood* v. *Denver & S. Platte Ry Co.* This decision was rendered on Jan. 7th, 1919, and the same appears in the Supreme Court Advance Opinions of Feb. 1st, 1919, at page 149. In the opinion in that case, the court said:

> "Of course we do not go behind the decision of the court that the matter in controversy was subject to regulation by the Commission and was regulated by it in due form if the state could confer that power. The plaintiff says that the state could not confer it, since to do so would impair the obligation of a contract. Upon that point we agree with the court below that clearer language than can be found in the state laws and this ordinance must be used before a public service is withdrawn from public control."

CONCLUSION.

We therefore respectfully urge that the decision of the Supreme Court of Oklahoma in this case should be affirmed.

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CITY OF PAWHUSKA *v.* PAWHUSKA OIL & GAS COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 281. Argued March 25, 1919.—Decided June 9, 1919.

As respects grants to municipalities of governmental authority—and such is the authority to regulate the rates charged to a city and its inhabitants by a gas company—the power of the States is not restrained by the contract clause of the Constitution. P. 397.

A city contended that, at the time when it granted a franchise to a gas company to use the streets and supply gas to the city and its inhabitants, the city alone had authority to regulate the charges and service thereunder within its municipal limits; that the legislature could not transfer that authority to a state commission consistently with the state constitution; and that in consequence a later act of the legislature, and an order of the commission thereunder changing the service and increasing the rates, impaired the obligation of the franchise contract between the city and the company. *Held*, that no question was presented under the contract clause affording this court jurisdiction to review a judgment against the city by the state Supreme Court. P. 396.

Writ of error to review 166 Pac. Rep. 1058, dismissed.

THE case is stated in the opinion.

Mr. Preston A. Shinn for plaintiff in error.

Mr. T. J. Leahy, with whom *Mr. C. S. Macdonald* and *Mr. Burdette Blue* were on the brief, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A city in Oklahoma is complaining here of an order of the corporation commission of the State, made in 1917, regulating the rates and service of a gas company engaged in supplying natural gas to the city and its inhabitants. The company has a franchise, granted by the city in 1909, which entitles it to have its pipe lines in the streets and alleys of the city and provides that the gas shall be supplied at flat or meter rates, at the option of the consumer, and that the rates shall not be in excess of fixed standards.

When the franchise was granted there was a provision in the state constitution, Art. XVIII, § 7, reading: "No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted"; and there also was a statutory provision, Rev. Stats. 1903, § 398; Rev. Laws, 1910, § 593, declaring: "All such grants shall be subject at all times to reasonable regulations by ordinance as to the use of streets and prices to be paid for gas or light."

In 1913 the state legislature adopted an act providing that the corporation commission "shall have general super-

vision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services." Laws 1913, c. 93, § 2. It was under this act, and after a full hearing on a petition presented by the gas company, that the order in question was made. The order abrogates all flat rates, increases the meter rates, requires that the gas be sold through meters to be supplied and installed at the company's expense, and recites that the evidence produced at the hearing disclosed that the franchise rates had become inadequate and unremunerative and that supplying gas at flat rates was productive of wasteful use. On an appeal by the city the Supreme Court of the State affirmed the order. 166 Pac. Rep. 1058.

The city contended in that court—and it so contends here—that at the time the franchise was granted it alone was authorized to regulate such charges and service within its municipal limits, that the legislature could not transfer that authority to the corporation commission consistently with the constitution of the State, and that in consequence the act under which the commission proceeded and the order made by it effected an impairment of the franchise contract between the city and the gas company in violation of the contract clause of the Constitution of the United States. Or, stating it in another way, the contention of the city was and is that the authority to regulate the rates and service, which concededly was reserved at the time the franchise was granted, was irrevocably delegated to the city by the constitution and laws of the State and therefore that the exertion of that authority by any other state agency, even though in conformity with a later enactment of the legislature, operated as an impairment of the franchise contract.

Dealing with this contention the state court, while fully conceding that the earlier statute delegated to the city the authority claimed by it, held that this delegation was

to endure only "until such time as the State saw fit to exercise its paramount authority," that under the state constitution the legislature could withdraw that authority from the city whenever in its judgment the public interest would be subserved thereby, and that it was effectively withdrawn from the city and confided to the corporation commission by the Act of 1913. The claim that this impaired the franchise contract was overruled.

It is not contended—nor could it well be—that any private right of the city was infringed, but only that a power to regulate in the public interest theretofore confided to it was taken away and lodged in another agency of the State—one created by the state constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the State is final.

"Muncipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with

the State within the meaning of the Federal Constitution." *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178.

In *Dartmouth College* v. *Woodward*, 4 Wheat. 518, it was distinctly recognized that as respects grants of political or governmental authority to cities, towns, counties and the like the legislative power of the States is not restrained by the contract clause of the Constitution, pp. 629–630, 659–664, 668, 694; and in *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, where was involved the validity of a state statute recalling a grant to a city, theretofore made and long in use, of power to operate and maintain a ferry over a river, it was said, p. 533, that the parties to the grant did not stand "in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interest. They changed as those interests demanded. The grantees, likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. . . . Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes." In *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, where a city, relying on the contract clause, sought a review by this court of a

judgment of a state court sustaining a statute so modifying the franchise of a water works company as to require the city to pay for water used for municipal purposes, to which it theretofore was entitled without charge, the writ of error was dismissed on the ground that no question of impairment within the meaning of the contract clause was involved. Some of the earlier cases were reviewed and it was said, p. 91, "But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the Water Works Company, than it would have had if such contract had been made directly with the State. The State, having authorized such contract, might revoke or modify it at its pleasure."

The principles announced and applied in these cases have been reiterated and enforced so often that the matter is no longer debatable. *Covington* v. *Kentucky*, 173 U. S. 231, 241; *Worcester* v. *Worcester Street Ry. Co.*, 196 U. S. 539, 548; *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Englewood* v. *Denver & South Platte Ry. Co.*, 248 U. S. 294, 296.

Writ of error dismissed.